

KEEPING AMERICA'S MASS TRANSPORTATION SYSTEM SAFE: ARE THE LAWS ADEQUATE?

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KEEPING AMERICA'S MASS TRANSPORTATION SYSTEM SAFE: ARE THE LAWS ADEQUATE?

THURSDAY, APRIL 8, 2004

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:38 p.m., in Room SD-226, Dirksen Senate Office Building, Hon. Jeff Sessions, presiding.

Present: Senators Sessions and Biden.

OPENING STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. The Committee on Judiciary will come to order. I am pleased to convene this hearing on "Keeping America's Mass Transportation System Safe: Are the Laws Adequate?" Senator Biden will be the Ranking Member today and will be in shortly. He asked that I go ahead and get started, so we will do that.

In this time of terror, there are issues that Congress is obligated to consider and discuss. Let me say from the beginning that I do appreciate Senator Biden, who has been a leader in the area of criminal law and he understands it very well.

My opening statement will refer back to March 11 of this year, when democracy was once again threatened when 911 after the attacks on the World Trade Center, terrorists again struck in Madrid against the Spanish Railway System. While that attack might not have resulted in as many deaths as happened in the United States on September 11, it is a troubling and deadly act telling us that the war against terrorism continues, that terrorists are out there still, and they are looking to attack our country whenever they have the opportunity, and that railways could be one of the prime areas that they would attack.

While there are many questions that remain unanswered about the infrastructure that we have today and its vulnerabilities, this hearing will focus on the criminal laws and whether or not they are adequate to respond to a terrorist attack on our mass transit system. I believe this hearing will reveal that the disturbing answer is no.

Every day, millions of Americans turn to mass transit for pleasure and business. To be exact, 32 million times a day, people board public transportation systems. When people board the subway to commute to work or take an Amtrak train to visit their family in another State, they should do so knowing that our laws are fully adequate to deter and punish anyone who would attack them.

On Tuesday of this week, I introduced S. 2289, the Railroad Carriers and Mass Transportation Act of 2004. This bill is very similar to S. 1608, the Anti-Terrorism Protection of Mass Transportation and Railroad Carriers Act of 2003, which I introduced last year. While I believe that S. 1608 addresses a number of important issues, some have expressed concern about the surveillance portion of that bill. Because the need to pass rail transportation provisions and protections is now, I was willing to modify that bill and eliminate those concerns that some of my colleagues may have had.

S. 2289 will provide many of the necessary tools to prosecute terrorist activities, many of which are not currently prosecutable as a terrorist act, by eliminating inconsistencies that exist between the "wrecking trains" statute and the Terrorist Acts Against Mass Transportation statute. Let me take a moment to highlight some of those troublesome inconsistencies.

The two laws address similar attacks on similar means of transportation, but they often provide inequitable results. For example, the current wrecking trains statute does not prohibit many types of attacks that are currently covered by the mass transportation statute. There is no reason that legislation should prohibit certain terrorist attacks on an airplane but not on a railroad carrier. To that end, the new bill will protect both mass transportation systems as well as railroad and freight carriers by consolidating the predicate crimes, including but not limited to interfering with a dispatcher or a driver, and the undermining of our transportation infrastructure.

Moreover, there presently exists a discrepancy in the severity of punishment for terrorists who attack trains versus those who attack other mass transportation systems. Under the current law, when someone violates the wrecking trains statute and that violation results in the death of a citizen, the criminal will be eligible for the death penalty. However, when someone commits a similarly substantial criminal act on a plane in violation of the mass transportation statute, he or she is not eligible for the death penalty. There is no justifiable reason for this distinction and we should eliminate it so that those who commit similar acts of evil against this country are faced with similar punishments for their crimes.

To that end, this bill will increase penalties for the most heinous attacks against mass transportation systems by classifying certain offenses, such as those involving mass transportation vehicles carrying passengers, as aggravated offenses. The penalty for these attacks range from a fine to imprisonment up to life, or under certain circumstances, death. These standards will cover railroad freight carriers as well as traditional mass transportation systems. Current law does not apply justice equally in these circumstances as it should, and S. 2289 remedies those concerns.

In addition, the new bill will make it a Federal crime to release biological agents or other hazardous materials on the property of mass transportation providers or railroad carriers, covering circumstances like Japan's subway gas attack.

It will eliminate the inconsistency between the requisite mens rea in the mass transportation statute and the wrecking trains statute so that a person must be shown to have knowingly com-

mitted the criminal offense. This change will help ease our law enforcement efforts to prosecute those who try to harm our citizens.

Those who wish to attack this country should know that we will no longer distinguish their attacks based on what means of mass transportation they choose to attack. We will move swiftly and severely against anyone who dares to challenge the comfort and safety of millions of Americans that travel by mass transportation every day.

On more than one occasion, the FBI has warned that intelligence has led to the belief that al Qaeda and other operatives are targeting the U.S. rail sector. These terrorists look to do anything, from destroying key rail bridges and sections of track to cause derailment or targeting hazardous material containers.

America has demanded more attention to rail security and the administration has responded. No less than two weeks ago, DHS announced plans to, among other things, develop a rapid response team centered on bomb-sniffing dogs and to implement a pilot program that would test the feasibility of screening luggage. However, we should not stop there. America demands more than additional security mechanisms. We have already responded to criminal threats by passing appropriate and adequate laws for the purpose of deterring criminal activities. So we must act proactively here to meet this requirement.

It is time to put the terrorists on notice that their activities against American citizens will be detected and will result in swift and strong punishment. We have to give law enforcement the ability to prosecute and the judicial system the ability to impose substantial sentences.

I believe that S. 2289 would accomplish some of these objectives. I look forward to hearing the testimony today and to working on securing America's mass transit systems through adequate criminal laws so that the next time someone asks, are the laws adequate, the answer will be yes.

We will be having a vote right now, at 2:45, I am told. Senator Biden should be here soon. The vote has started already. It will take me about ten minutes to go and vote. I will go and cast my vote and return and then we will have our first panel.

Thank you, and we are adjourned for the interim.

[Recess from 2:46 p.m. until 3:05 p.m.]

Senator SESSIONS. Senator Biden, I expect, will come by shortly. The vote is ongoing right now.

But we have an excellent panel of witnesses who can help us with some rather technical matters involving this legislation. As a prosecutor myself for quite a number of years, I on more than one occasion had the opportunity to be looking to charge a defendant with a crime and be shocked that they weren't covered, that it just wasn't there, or you had to charge with some other lesser crime because that was the only thing that was chargeable.

On the matters of terrorism, we ought to be able to ensure that no crime of terrorism has to be charged in some secondary way. We ought to have a clear statute that covers that.

So our first panel, if you will step forward. Mr. Sandy Mattice is currently serving as United States Attorney for the Eastern District of Tennessee. We have got a history of some good United

States Attorneys there. I have known several over the years. Prior to his service as United States Attorney, he served for more than 10 years as Senior Counsel to the United States Senate Committee on Governmental Affairs. We didn't get them all straight.

[Laughter.]

Senator SESSIONS. He has private practice experience, having been an associate and partner of the firm of Miller and Martin in Chattanooga and associated with the firm of Baker, Donaldson, Behrman, and Caldwell in Chattanooga, Tennessee.

Mark Lindsey has served as Chief Counsel of the Federal Railroad Administration since 1987. Prior to serving in this capacity, he was Assistant Chief Counsel from 1978 to 1984. Mr. Lindsey received his law degree from Yale Law School in 1971.

Mr. Mattice, we will be delighted to take your testimony, then turn to Mr. Lindsey. I would ask that you limit your comments to ten minutes, if you could. Mr. Mattice?

STATEMENT OF HARRY S. MATTICE, JR., U.S. ATTORNEY, EASTERN DISTRICT OF TENNESSEE, CHATTANOOGA, TENNESSEE

Mr. MATTICE. Thank you, Mr. Chairman, and good afternoon. Good afternoon to the distinguished members of the Committee. Thank you for the opportunity to join you today to discuss the adequacy of the laws protecting America's mass transportation and railroad systems.

In the wake of Madrid rail bombings and the subsequent discovery of unexploded bombs underneath the railway lines in France and Spain, this hearing addresses a timely and important issue. Mass transportation and railroad systems play a vital role in the life of our Nation. Americans regularly use trains, buses, airplanes, and other mass transportation vehicles to commute to work, visit loved ones, and go on vacation. Railroads are also used to transport vital goods and materials across the country.

The availability of safe and reliable mass transportation and railroad systems is critical to the health of our Nation's economy as well as Americans' quality of life, so we must remain vigilant and prepare for the possibility that terrorists may attempt to launch attacks on those systems.

The protection of mass transportation and railroad systems obviously requires a multi-faceted approach. In my testimony today, however, I would like to focus on one critical element of any strategy for safeguarding our Nation's railways, buses, subways, ferries, and passenger aircraft, the existence of strong, consistent, and effective criminal sanctions under Federal law for those perpetrating attacks on mass transportation and railroad systems.

In 2001, Congress took an important step towards protecting mass transportation systems when it passed the USA PATRIOT Act. Section 801 of the Act created a new Federal statute, 18 U.S.C. Section 1993, which criminalizes terrorist attacks and other acts of violence against mass transportation systems.

As the U.S. Attorney for the Eastern District of Tennessee, I have witnessed firsthand the value of this new statutory provision. Recently, a passenger on a Greyhound bus traveling from Nashville, Tennessee, to Knoxville allegedly caused disturbances on the bus and then attempted to assault the bus driver with a knife.

Thankfully, other passengers were able to subdue this individual before he was able to reach the driver. But the driver, other passengers, and members of the general public were put at significant risk by this passenger's alleged conduct.

After reviewing the available options, my office determined that the best avenue for prosecuting this violent passenger effectively was to charge him under the new Federal statute prohibiting terrorist violence against mass transportation systems contained in Section 801 of the USA PATRIOT Act. The passenger was subsequently indicted for violating 18 U.S.C. Section 1993 and a jury trial has been scheduled for June 8 of this year.

As this case demonstrates, Congress and the administration have taken significant steps towards ensuring that those who attack mass transportation and railroad systems are effectively prosecuted and appropriately punished. But there is still more to be done to close gaps in these statutes and make them clear and less vulnerable to legal challenge.

This is why the Department of Justice strongly supports S. 2289, the Railroad Carriers and Mass Transportation Protection Act of 2004, recently introduced by you, Mr. Chairman, and I want to take this opportunity, Mr. Chairman, to thank you for your leadership role in this area. The same legislation has also been introduced in the House of Representatives by Congresswoman Capito.

S. 2289 would make a number of significant improvements to the Federal criminal laws protecting mass transportation systems and railroad systems. I will highlight a few of the most significant and important changes.

To begin with, S. 2289 would consolidate the new Mass Transportation statute, 18 U.S.C. Section 1993, and the statute imposing criminal sanctions on wrecking trains, 18 U.S.C. Section 1992, into a new criminal prohibition against attacks on mass transportation systems on land, on the water, or through the air, and against railroad carriers. This consolidation would harmonize the laws protecting mass transportation systems, including passenger trains, and the laws protecting railroads, including freight trains.

Under existing law, for example, the wrecking trains statute does not prohibit many types of attacks that are currently covered by the mass transportation statute, such as interfering with, disabling, or incapacitating a dispatcher or driver. S. 2289 would eliminate these inconsistencies.

It would also strengthen the protecting of mass transportation and railroad systems by updating the law to match current developments and by making the statutory language more precise in several respects. It would also broaden the statute's coverage by updating the definition of "dangerous weapons" to cover box cutters and other previously unrecognized weapons.

S. 2289 would also ensure that terrorists who attack mass transportation systems are punished with the appropriate severity. Currently, for instance, while those violating the wrecking trains statutes are eligible for the death penalty if their offense results in death, those violating the mass transportation statute are not eligible for the death penalty.

S. 2289 would end this senseless discrepancy and would increase penalties for the most serious attacks against mass transportation

systems by making it an aggravated offense to commit the prohibited terrorist acts in situations involving vehicles carrying passengers, high-level radioactive waste, spent nuclear fuel, or a designated hazardous material. For an offense resulting in the death of any person, the defendant will receive either capital punishment or life in prison.

In conclusion, the Department of Justice believes that S. 2289, the Railroad Carriers and Mass Transportation Protection Act of 2004, would greatly assist in prosecuting those who perpetrate terrorist attacks upon this Nation's mass transportation and railroad systems.

Thank you once again for allowing me to appear before you, and I look forward to your questions on this important issue.

Senator SESSIONS. Thank you very much, Mr. Mattice.

[The prepared statement of Mr. Mattice appears as a submission for the record.]

Senator SESSIONS. Mr. Lindsey, we are glad to hear from you.

STATEMENT OF S. MARK LINDSEY, CHIEF COUNSEL, FEDERAL RAIL ADMINISTRATION, DEPARTMENT OF TRANSPORTATION, WASHINGTON, D.C.

Mr. LINDSEY. Thank you, Mr. Chairman. Good afternoon. I am very pleased to be here to testify on behalf of the Secretary of Transportation concerning improving the criminal laws addressing sabotage and terrorism on the rails and in mass transit. We think this is extremely important. I ask that you put my full statement in the record and I will summarize it very briefly.

Senator SESSIONS. We will be glad to make that a part of the record and hear your comments.

Mr. LINDSEY. Thank you, Mr. Chairman. The hearing is especially timely in the wake of the March 11 attacks in Madrid. Certainly, those were extremely serious attacks. We from the FRA, though, have over a number of years observed a fairly steady drumbeat of acts against railroads of much lesser magnitude.

We see it as extremely important, not just to address these large headline-capturing events but also the many smaller ones that have occurred, that there be strong, effective, consistent criminal statutes that enable prosecutors to go after the people who perpetrate these acts effectively and to deter those who are susceptible of deterrence. Now, granted, they aren't all. Our first line of defense needs to be to try to detect those who might do it and prevent them in the first place. But it is certainly extremely important that when we have potential perpetrators who are deterrable, that we have strong, effective criminal statutes which will do that.

The existing wrecking train statute dates from 1940 and shows its age a bit. Mr. Mattice certainly laid out a number of the ways, and you did, sir, in your opening statement, in which S. 2289 would improve the existing statutes. The Department very strongly supports S. 2289. We have been looking for legislation of this sort for a good 7 years and we are eager to work with you to enact such a statute, which we think is very badly needed.

Secretary Mineta has been very strong in his leadership in transportation security, setting a strong example for everyone in the Department of Transportation to follow in pursuing it. I know under

his leadership that we are eager to work with you to enact this legislation.

Instead of repeating in detail all of the ways that S. 2289 would improve the statutes, I think I will simply stop there, sir, and respond to your questions.

[The prepared statement of Mr. Lindsey appears as a submission for the record.]

Senator SESSIONS. I think Senator Biden will be here shortly.

Mr. Mattice, if you are trying to prevent a terrorist attack, and I understand that is the key philosophy now of the Department of Justice, the FBI, and the Attorney General is to not wait to prosecute a criminal afterwards, but to try to intervene in advance. You can't make an arrest unless there is a crime afoot, can you? In other words, if you know somebody is going to do something and it is not a Federal crime, it can undermine your ability to make a preventive arrest, is that not right?

Mr. MATTICE. That is correct, Mr. Chairman. In the absence of a clearly definable criminal statute on point, we are without authority to act with our investigative and arresting agencies to issue a request for an arrest warrant.

Senator SESSIONS. Senator Biden, this is the first question I asked and—

Senator BIDEN. No, no, no, go. I will catch up.

Senator SESSIONS. Okay. We will go right ahead, then. I will ask you this. Under the current law, the statute prohibiting the wrecking of trains, 18 U.S.C. 1992, provides for the option of a death penalty if an attack on a train results in a death of a person. However, the statute prohibiting a terrorist attack or other acts of violence against mass transportation systems, Section 1993, does not if an attack is on a mass transportation system and causes death. Do you see any reason for that disparity? Should we fix it, and does this bill do so adequately? Mr. Mattice?

Mr. MATTICE. Your Honor, first of all—or Mr. Chairman, I am sorry.

Senator SESSIONS. That is all right. I am glad to hear a real lawyer in here.

Mr. MATTICE. I am used to being a lawyer in court, Mr. Chairman.

[Laughter.]

Mr. MATTICE. Certainly, I see no reason for—

Senator SESSIONS. I still say that to Senator Biden when he was chairing the Committee.

Mr. MATTICE. I see no reason for the disparity in that respect. This statute does fix that disparity, and certainly, as we have come to recognize the unfortunate ingenuity of certain people intent on doing harm with various devices, it would be a valuable law enforcement and prosecutorial tool.

Senator SESSIONS. Now, under 1993, current law, it prohibits the placing of a biological agent or toxin on or near a mass transportation vehicle with the intent to endanger the safety of any passenger or employee of the mass transportation provider. Eighteen U.S.C. 1992, however, does not similarly prohibit placing a biological agent or toxin on or near a freight train.

Mr. Lindsey, I guess that is a concern to your agency. Do you see any reason for the disparity? Is there, and am I correct that there is one, and should we fix it, and do we do so adequately in this legislation?

Mr. LINDSEY. Yes, Mr. Chairman, you are correct. There is a disparity, and no, there is no sound rationale for the disparity, and yes, sir, I think S. 2289 does fix it correctly and adequately. I think it is very important that it do so. Freight trains carry a tremendous variety of commodities, among which are hazardous materials of all types. Should the placement of a biological agent on a train, for example, disable the operating crew, making available to somebody some of the hazardous materials on the train, that would be an extremely adverse event. We ought to deter that event if we can and punish it harshly wherever we cannot.

Senator SESSIONS. A train, even though it is a freight train, not a passenger train, has the potential to do tremendous amounts of damage, either caused by the chemicals it may be carrying or surreptitiously may have been placed on it, very dangerous chemicals and toxins. There seems to be a gap there, particularly for freight trains, under our current law. Is that correct?

Mr. LINDSEY. That is correct, Mr. Chairman. A tremendous amount of the freight flowing in international commerce and through the United States occurs in enclosed freight containers that might contain all sorts of things, and it would certainly be an extremely adverse event were a toxin or biological agent placed in one of those. We certainly need an adequate criminal statute to be able to address any such event.

Senator SESSIONS. The way we have written this, we use the standard of "knowingly." I don't know if you are aware of it, Mr. Mattice, because that is a significant prosecutorial standard of proof. It is not the highest. But as I read the statute and it is our intent, if the offense were to rise to the level of a potential death penalty, the death penalty statute that requires willful and knowingly, I believe the language is in that penalty section. Intentionally is a standard which is a higher standard than knowingly. That would cover any death penalty case, or have you had a chance to look at that? I should have given you advance notice.

Mr. MATTICE. Mr. Chairman, yes. We have looked at that and we believe that the knowingly standard, as incorporated in S. 2289, would be sufficient to permit this to be a death-eligible statute.

Senator SESSIONS. It would make it a death-eligible statute. But before the imposition of the death penalty—and I think this is important. I think "knowingly" is, frankly, not a sufficient standard for the death penalty. I think somebody should intentionally do something before you execute them. The death penalty statute, 3591, says a defendant who has been found guilty of these certain offenses that carries a death penalty, intentionally killed a victim and so forth. So the intent requirement that is the highest standard is in the—before you could do a death penalty, you would have to meet that standard.

Mr. MATTICE. Yes, Mr. Chairman, that is correct. Under the scheme in Federal law, as you now, you can have a variety—well, not a variety, a limited number of offenses that are so-called death-eligible, and then the way the Federal statutory scheme works,

then in order to make a recommendation of death in a particular case, you go to another statutory scheme that does have very stringent guidelines before the prosecutor can actually make a recommendation to the Attorney General to seek death in a particular case.

Senator SESSIONS. Very good.

Senator Biden, I thank you for coming. I know you have a tremendous amount of activities, and especially as the Ranking Member on the Foreign Relations Committee. I know there has been a lot going on there. Over the years, Mr. Mattice, Senator Biden has been a key player in things such as the sentencing guidelines and other things that prosecutors like us have used. So I am glad you could be here, Senator Biden, and you take any time you need to make any opening statement you would like, and also you have your questions.

**STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR
FROM THE STATE OF DELAWARE**

Senator BIDEN. Thank you, Mr. Chairman. Obviously, my schedule is no busier than yours. We just have different calls on us at the moment.

This is an issue which the Chairman knows I have been intensely interested in for a long time. As usual, the Chairman not only knows the law and the statute, but knows the constitutional requirement under the death penalty statutes. They are written the way they did to comport with the Supreme Court rulings on the requirement of intent.

There are two phases, I think, to the Chairman holding this hearing, two pieces. One is the enforcement side of this. We are talking about it now, and that is whether or not we should have a death penalty. We should rationalize the statutes that exist, and I think he is right.

I think his legislation is—I must tell you, I haven't fly-specked it myself, but based on what I know, I agree with what the Senator is attempting to do, and I guess we are going to have a second panel a little bit later that is going to talk about the prevention side, not in terms of dissuading because of penalty, but physically preventing this from happening.

But I would like to ask about resources on the law enforcement side of this a moment. I will be relatively brief here.

We rely heavily, as you know as a prosecutor, and Mr. Lindsey, as you well know, on the expertise and the talent of the FBI in a lot of these cases, although a lot of these cases, I mean, when we find a terrorist trying to take down a tunnel or a track or a bridge over which a train is going, it is as likely to have it be some local county sheriff finding that person as it is someone with night-vision goggles wearing fatigues working for the Special Forces Unit.

I realize this cuts across, but the FBI is an integral part of all of this. What we have learned from al Qaeda is that they are persistent and they tend to want targets that are celebrated in the sense that they can either have significant symbolic imagery if they are hit and/or do significant damage.

One of the things the Chairman and I—he may remember this—a year ago talked about was we are concerned about someone put-

ting plastic on their body and walking into a city bus and blowing themselves up, or a restaurant. We see that happening in other parts of the world. It happened in Paris as many as 15 years ago and it is happening in Israel every day.

But what we are trying to figure out is how we prevent the catastrophic event. We can't stop everything. I know there are over 100,000 miles of track in the United States of America because, as my friend—and he has been supportive of this—my friend will tell you, I have been a broken record on rail security for God knows how long. People say to me, well, you can't protect every mile of track. Well, that is true, but I sure can protect 350,000 people in the tunnels underneath New York City today. That is how many people will be in the seat of a train underneath the ground in a tunnel, the most recent one of which was built in 1911, with no security, no lighting, et cetera.

Now to my question. The FBI is critical. The major cities in America where we have counterterrorism forces are the ones that we are assuming is the most likely place an al Qaeda will go, though they can go anywhere, but they are more likely to go to New York City, Los Angeles, Atlanta, than they are to Selbyville, Delaware, or the Eastern Shore of Maryland, et cetera. We have relatively large offices there of the FBI. The FBI agents talk about the harsh realities of the ultimate impact investigations, is the phrase they use, in these major cities where the major damage could be done.

Now, I have spent a lot of my time here, the Chairman, as a prosecutor prior to coming here, to understand there is some correlation between resources and protection. These young women and men joining the FBI, many of whom have law degrees, most have advanced degrees, are, for example, in New York City, there is an article in USA Today titled, "Low Pay Squeezes FBI Agents, Perhaps U.S. Security."

There is a quote from a young man who is—it talks about this low pay and describes how one young agent in the New York City office, a law school graduate, a former Marine captain, whose starting salary is \$39,000 a year—\$39,000 a year. He lives in a sparse rented apartment 42 miles away from the City of New York because it is the only place he can find one to live because he can't afford to live where he works. The agent said, quote, "I took an oath when I joined the FBI. I never thought it would also include the vow of poverty," end of quote.

So my question is this. Do you fellows think, and I realize it is above your pay grade, as we say, to be able to—but just from your experiences, do you believe that we should be going back and taking a look at the starting salaries we are paying the brightest young women and men we are looking for to be the front line in a very sophisticated line of work—forget the danger, just a sophisticated line of work requiring some real ingenuity and capability. Do you think we should be paying these folks more to start?

I mean, patriotism is a motivating factor, but when you have a law school degree, you can start in that same city and get a job on Wall Street. I think the starting salary now in law firms, you know, they have a standard start, I think it is \$158,000, \$160,000, and yet we are asking these same bright people to maybe be

agents, work as a counterterrorism specialist in the FBI office in New York City and start at \$39,000.

What do you think? Talk to me about that. Or is it enough that we are just still going to attract just really good, bright people and that is all we can afford or should afford? I know as prosecutor, you are not making a lot of money, either, but you will get no empathy up here.

[Laughter.]

Mr. LINDSEY. Do you want to take the first shot?

Mr. MATTICE. I guess I will take the first crack, Senator. Thank you for the question. As you point out, they make these decisions above my pay grade, and certainly as a Federal employee and as a citizen, I certainly understand the competing demands on the Federal budget. In one sense, having the privilege to serve as U.S. Attorney and observing our law enforcement officers working on a day-to-day basis, and I have to say, I have to emphasize, it has been my privilege to serve in this capacity. There are days when I think there is not enough money in the world to compensate the folks for the service that they render to this country. On the other hand, it has also been my experience that most of them do it not for the money, for the privilege of serving themselves.

I hate to come down that way. As I say, they do make those decisions above my pay grade and I guess we can only hope until we find a way or until policy makers such as yourself and the administration who sets the budget finds a way to allocate the scarce resources out there for all our needs, I guess we just have to hope that we do have the sort of dedicated folks out there who are willing to make—who they and their families are willing to make the sacrifices necessary to protect us.

Senator BIDEN. What I am going to urge my colleagues to think about, and professionals like you guys, is I agree it is never going to be competitive. I am not suggesting that. Otherwise, my son wouldn't be making \$50,000 as an Assistant U.S. Attorney in Philadelphia, although he has now, after 7 years, gone. You would have made a lot more as U.S. Attorney, the same as you, sir, and that also goes for your job, Mr. Lindsey.

But I do think \$39,000 to start is shamefully low in terms of what we ask these folks to live on, and it is not like they are living in suburban Wilmington, Delaware, or in suburban Birmingham, which are still high standards of living, but living in San Francisco, New York, Atlanta, Miami, places where there is a very high cost of living.

Let me switch and I will end my questioning of this panel, Mr. Chairman.

One of the things that frustrates me is, and this is mainly directed to you, Mr. Lindsey, is to state my—I was going to try to figure out how to ask this question without revealing my prejudice, but it is so obvious what my prejudice is, I might as well not try to even pretend to be objective.

We have a set of very stringent laws, which I fully support, relative to airline passenger travel. We literally have, not figuratively, literally have scissors women use to trim their eyebrows taken as they go through a metal detector. I have had literally a nail clipper you buy for \$1.79 taken, and I am not complaining. There is a

whole bevy of laws relating to airlines that talk about and make it a crime to possess a weapon, possess an explosive, et cetera.

But that same legislation does not apply to public transportation other than airlines. Why, when you have 560 people on a loaded Amtrak train, about 24 of which will leave and arrive in the station today down the street, which contain more people, or as many people as a loaded 747, is there any reason why we shouldn't rationalize the law, that if you bring a weapon, if you—I am not figuring out how you detect it, but if there is a weapon that you bring onto that train, it is ipso facto a violation of Federal law, like it is if you go onto an airline? Can you think of any rationale why we should treat them differently?

Mr. LINDSEY. Certainly, there is a great deal of value in consistency here, Senator Biden. I would certainly agree with that. There are some differences in the kinds of vehicles. I think S. 2289 ends up addressing very well what a potential bad actor can do on a train.

Some of the differences that make a difference between trains and airplanes, for example, is that compared to the difficulty of getting into an airline cockpit, it is very, very hard to get into the engine compartment of a train. You can't readily get there from a passenger car, and should you get there, then you don't really have the ability to direct the vehicle someplace else. So there are some differences in the modes of transportation that do make a difference.

That said, I think it is extremely important that we reach all those kinds of weapons about which you spoke and things that can be turned into weapons, such as box cutters, which S. 2289 would certainly include among dangerous weapons, that a few years ago no one would have thought was worth covering and that the wrecking train statute sure didn't. It is extremely important that we be able to include those and that when anybody comes on and uses them, certainly, that—

Senator BIDEN. But how about the mere possession? If you get on an airplane with the mere possession of an explosive and incendiary device or other dangerous weapon, it is a violation of Federal law. Why, when I commute every day back and forth to Wilmington, Delaware, and I get on a packed train, knowing that if, in fact, someone has an incendiary device in a duffel bag that is in the middle car going under the Baltimore tunnel, which was built in 1869, and explodes it, it is guaranteed to do as much damage as would occur if that device went off in a 747 flying at 35,000 feet. Why should it not be automatically, ipso facto, just like getting on an aircraft with an incendiary device, a violation of the law?

Mr. LINDSEY. I can't think of any reason why it shouldn't be, sir.

Senator BIDEN. Okay. I thank you both very, very much, and I thank you, Mr. Chairman. With your permission, Mr. Chairman, I may have two questions each in writing—I will not make a lot of work for you—that at your leisure you could answer in writing for the Committee. I would appreciate that if that is all right, Mr. Chairman.

Senator SESSIONS. Fine.

Senator BIDEN. I would ask unanimous consent, Mr. Chairman, that my opening statement, because I apologize again for being late, be entered in the record at the beginning of the hearing as if I had delivered it.

Senator SESSIONS. Without objection, we will put that in at the appropriate place.

[The prepared statement of Senator Biden appears as a submission for the record.]

Senator SESSIONS. This statute, the bill that I proposed, does include expanded definitions of weapons for railways, does it not, Mr. Lindsey?

Mr. LINDSEY. Yes, sir, it certainly does.

Senator SESSIONS. And it includes box cutters and knives and other things, is that right?

Mr. LINDSEY. Yes, sir. The definition of dangerous weapon is now very broad and comprehensive.

Senator SESSIONS. Could it help you under certain circumstances? I know it won't cover everything, but under certain circumstances, it could be a valuable tool for law enforcement.

Mr. LINDSEY. Yes, sir. In a variety of circumstances that we have seen over the years, the expanded definition of dangerous weapon will be very important.

Senator BIDEN. Mr. Chairman, if I could ask a point here, because I want to support your legislation, I want to ask for a point of clarification. What you are referring to is on page four of the bill, Subsection 6—

Senator SESSIONS. Page seven.

Senator BIDEN. Oh, okay. I am sorry. I was really looking at page four. It says, "engaging in conduct, including the use of a dangerous weapon with intent to cause death or serious bodily injury." I apologize because maybe it is just—

Senator SESSIONS. I was having a hard time finding it myself. Staff had to help me. The bottom of page seven, under definitions, defines dangerous weapon.

Senator BIDEN. Now, here is my point. As I understand, again, now I pretend no expertise in your bill because I have not thoroughly read it. Subsection E—page seven, definition, biological agent, dangerous weapon, refers back to the use of it. The crime is the use of it, not the possession of it.

Mr. LINDSEY. That is correct.

Senator SESSIONS. Yes.

Senator BIDEN. My point is, if you get on an aircraft, whether you use it or not, if you get on an aircraft with a loaded weapon, you get on an aircraft and you get through security with a biological agent in your valise, you get on an aircraft with possession of an incendiary device, the mere possession of it is a violation of Federal law.

I would urge you to think about the possibility of amending this to not make box cutters a violation of Federal law, because there is a correlation. It is difficult to get into—by the way, the new trains, just so you know, the new train sets, as you well know, they have a door. They have a door that you can enter from the last car into the engine. The other trains do not have a door. You have to

get outside, pull a "Silver Streak," jump on top of the engine, and get down.

Now, granted, it is reinforced. What I don't know is whether it is as reinforced under the specifications that exist for airlines. I don't think it is. I could be wrong. And you do know every conductor has a key.

Mr. LINDSEY. Yes.

Senator BIDEN. Every conductor has a key, unlike what happens on the airline. None of the stewardesses have a key to get into that door. So the fact is, we are still making false distinctions here.

I promise you, because of the lack of security on switching, I can take a new Metroliner, and we call them—they are no longer called Metroliners—a new Metroliner with 500 people at 150 miles an hour and run it through that damn station, never having been able to brake once, and kill thousands of people, the people in and the people in the station. And all I have to do is take a gun to a head of a conductor up front, walk him through that door with his key, make it right to the engineer, shoot him in the head, full throttle, and have someone working just like they did on the ground, making sure that the switching is locked, because there is no security on the switching. And I promise you, seven cars at 150 miles an hour will make a wreck on an aircraft look like a game.

Nobody listens to me. Nobody pays attention, and that is my frustration. You sit there, and I have great respect for you, sir. You are talking about how you can't get in the engines. You can get in the engines. You don't even have the security requirements that exist now for stewardesses on an aircraft because we have this ridiculous mindset that only bad things can happen in the air.

The last point I will make, Mr. Chairman, and I didn't use to say this, but the terrorists know this already. All you have got to do is get in the freight yard here right four blocks down the road here, take an ammonium oxide tanker, put an incendiary device underneath it that is time—that is how they have been blowing up these trains, you know—wait until it gets under the Supreme Court of the United States, and I promise you, Mr. Chairman, you will see the Supreme Court sink into a 50-foot hole.

It goes by. You want to make real news? Wait until you take out the Cannon Building. It is not a joke. It is real, real. We have no guards. We have no security. And guess what? You can walk on that train with as many pounds of plastic as you can, acting like you are a jeweler, wheeling the big carts that have their big jewelry in it. No one checks it. And you want to blow up—I think it is the Cannon Building. Which one, Jim? It is the Cannon Building. Take out 150 Congressmen and their staff. You think a plane full of fuel is a problem, hang on. Hang on.

So I hope you would consider just changing one thing, and that is making the mere possession on a mode of public transportation of an incendiary device, an explosive device, a weapon, a gun. I am not worried about box cutters as much as I am—that is a problem, maybe. But I would just settle for being able to take on a 50-pound bomb. Again, we don't know the facts.

I used to hesitate to say this, Mr. Chairman, because I don't want to publish it, but I finally figured out from our agency that al Qaeda, all these guys know this. It is not like—the only people

I am hiding it from are the American people. Al Qaeda knows. They know the tunnels. We have been warned, by the way, as long as two-and-a-half years ago. We, the United States of America, warned by our own intelligence service that rail is a likely target, rail, both passenger and freight.

You saw what happened when a tanker blew up in North Dakota, for God's sake, in the middle of nowhere, in an area that is twice as big as my whole State, and what it did to two whole towns.

So I hope we get serious about this, because I want to tell you something. It is a little like Pontius Pilate as we approach Easter. He said, "I wash my hands of this." I tell you what. I am washing my hands of this. Warning, warning, warning, warning, warning. This is self-evident and obvious and we are doing thus far nothing. Homeland Security so far has done nothing.

I am sorry, Mr. Chairman. This is more than a hobby horse. I think this is the place where you are going to see significant casualties of Americans if we don't get smart.

Senator SESSIONS. We appreciate your insight and knowledge of the rail industry and the problems and threats it faces and maybe we can make some progress on some of those suggestions that you make, that is for sure.

I appreciate also your expression of interest in the FBI. They are working very, very hard. That starting salary does appear to be low. I think there is some additional compensation in the major urban areas, but it does trouble me, that starting salary for a person with a law degree or accounting degree, CPA. They would not be starting at that.

One thing I would ask you just on that subject, Mr. Mattice. I know that since September 11, I suppose, the Attorney General and the FBI Director have made terrorism a top priority, the top priority of the FBI and the Department of Justice. In your experience with what is happening in Tennessee, do you think that that has sunk in? Are the FBI agents out in the country of America, throughout this country, do they react first and foremost, no matter what else is on their plate, to anything dealing with terrorism now?

Mr. MATTICE. Mr. Chairman, there is no question about it. It has been my experience since I came into office, and I was sworn into office on October 16 of 2001, just a month after 9/11, and by the time I got there, there was no question that it was the number one priority of the FBI, including in the Eastern District of Tennessee, a relatively rural district like much of the country out there, as well as my office.

By the time I got there, only a month after 9/11, there was already set up what was called the Anti-Terrorism Task Force run out of my office. Shortly thereafter, the FBI followed on our heels of setting up the Joint Terrorism Task Force for East Tennessee. I have monthly, if not more frequent, meetings with the Special Agent in Charge of the Knoxville Division of the FBI. The sole topic is terrorist issues in our district. We coordinate, as I say, at least that frequently face to face, not to say the countless phone calls we have. It have been my experience that in places like East Tennessee, there is no doubt that—

Senator SESSIONS. I think that is important, because we have seen some things. A lot of these cases have bubbled up from areas not just in the big cities. They may be carrying out their attacks here, but a lot of the people knew about it. I knew that this was supposedly occurring. I am glad to see it is.

I believe we have one more panel. Thank you so much for your testimony.

We have Chief Ernest R. Frazier, who is Amtrak's top law enforcement officer, having been appointed Chief of Police in May of 1994. In December of 2001, he testified before the Senate Governmental Affairs Committee regarding the security of our passenger and rail infrastructure. He served in the Army as an intelligence analyst and also holds a law degree from Rutgers University School of Law.

Brian Michael Jenkins, a captain in the Green Berets, is one of the world's foremost authorities on terrorism and sophisticated crime. He was a White House appointee during the Clinton administration, working in several capacities in the field of transportation counterterrorism. He is currently the Director of the National Transportation Security Center for the Mineta Transportation Institute and senior advisor to the President of the RAND Corporation.

First we will hear from Mr. Frazier, and then turn to Mr. Jenkins. Again, we will enter your full statements in the record. If you would keep your remarks to the ten-minute limit, we would appreciate that.

Mr. Frazier?

**STATEMENT OF ERNEST R. FRAZIER, SR., CHIEF OF POLICE
AND SECURITY DEPARTMENT, NATIONAL RAILROAD PAS-
SENGER CORPORATION, WASHINGTON, D.C.**

Chief FRAZIER. Mr. Chairman and Senator Biden, members of the Senate Judiciary Committee, thank you for the opportunity to testify before this important hearing concerning the laws on mass transportation security.

Amtrak is the nation's only inter-city passenger rail transportation company and operates over 300 trains per day over some 22,000 miles of rail with approximately 540 stations in 46 States. Like rail transportation systems worldwide and mass transit systems in the United States, Amtrak functions in a very open transportation environment. Because of advantages such as easy access, convenient locations, and intermodal connections, rail and mass transit systems are completely different from the structure and organization of the airline transportation and airport industry. As a result, the security framework that works ideally in the airport setting is not transferrable to rail station systems.

The Amtrak Police Department has 342 sworn officers, with most of its security force located in the Northeast Corridor, where Amtrak runs and operates the tracks and infrastructure. In 1992, the Amtrak Police Department received its distinction of being the first national law enforcement agency in the nation accredited by the Commission of Accreditation for Law Enforcement Agencies. It has been re-accredited in 1997 and 2002.

Though the Amtrak Police Department is a traditional police department, since September 11, 2001, our department has worked to develop terrorism-based vulnerability and threat assessments, emergency response and evacuation plans, as well as security measures that address not only vandalism and other forms of street crime that were occurring on our system, but the potential for explosions and blast effects at critical infrastructure locations.

Amtrak has also developed a security threat level response plan that mirrors the Homeland Security Advisory System and requires Amtrak to engage in specific security countermeasures according to the existing threat level.

Amtrak has also increased its police canine patrols by adding 12 explosive detection canine teams to conduct random sweeps of baggage rooms, train platforms, and stations. The Police Department has also purchased full-face respirators for all sworn personnel and deployed these devices for Amtrak's first responders to protect against CBR attack. In major stations, gamma/neutron radiological detectors have been also deployed to address radiological threats.

The Amtrak Police Department does budget for elevations in HSAS. Frankly, manpower costs when we go to "orange" are roughly \$11,000 in additional funds a day. However, there have been so many days already this fiscal year that we are coming close to surpassing this reserve budget.

We also recognize that we must stand ready to manage an incident if and when there is some form of attack. Through our Office of Emergency Preparedness, we conduct training for first responder agencies, over 21,000 of them situated along the Amtrak service route. We have purchased a public safety database that lists each police, fire, and emergency rescue agency in order to facilitate State and local emergency response and to establish a clear record of agency training.

Specifically with respect to criminal law sanctions, Amtrak agrees with the language of S. 2289 that reconciles criminal acts of terrorism against mass transit systems and amends the railroad section of the United States Crimes Code by including passenger rail. Any act of terrorism committed against a passenger and/or mass transit rail system should be treated in the same fashion.

While criminal sanctions, such as S. 2289, are important tools to have in this new security environment, I would also ask the Committee and your colleagues in the Senate and House to address some basic legal matters that confront railroad police across the nation and at Amtrak.

Specifically, rail police are not on the same equitable level as State, local, and mass transit police in key areas, such as the ability to participate in safety programs, such as the bulletproof vest partnership program, entitlement to public safety officer benefits, and in some States like California, the ability to directly access law enforcement records while performing stops.

Further, while Amtrak has submitted security plans to the government for review and currently has been included in recent rail security funding legislation, which is S. 2273, which was reported out of the Senate Commerce Committee today, the lack of a consistent and ongoing source of security-related funding will be an

issue into the future. It is an immediate need and should be addressed through legislation.

I thank you for this opportunity to provide testimony to the Committee.

Senator SESSIONS. Thank you.

[The prepared statement of Mr. Frazier appears as a submission for the record.]

Senator SESSIONS. Mr. Jenkins, we are glad to have you with us.

STATEMENT OF BRIAN MICHAEL JENKINS, DIRECTOR, NATIONAL TRANSPORTATION SECURITY CENTER, MINETA TRANSPORTATION INSTITUTE, SAN JOSE, CALIFORNIA

Mr. JENKINS. Thank you very much, Mr. Chairman, Senator Biden. I have provided the Committee with written testimony. Let me just highlight six points of that testimony very, very quickly so that we can proceed to the questions and answers; we may even have some argument on some of these issues, but perhaps not on others.

First of all, with regard to the threat, there is no question that the threat is real. Trains and buses have become highly attractive targets to terrorists, particularly terrorists bent upon high body counts. If we look at it from the terrorist perspective—for terrorists are determined to kill in quantity, willing to kill indiscriminately—trains, subways, and buses are ideal targets. They offer the terrorists ease of access, ease of escape, crowds. And contained environments in train coaches and buses and tunnels are especially vulnerable to both conventional explosives and unconventional weapons.

We also know that terrorist attacks on public transportation systems cause great disruption and alarm. These are the traditional objectives of terrorists. And in the last two-and-a-half years, since 9/11, we have not only seen the attack in Madrid, but we know now about a number of plots that were thwarted or discovered in other places, in Singapore, in Italy, in the Philippines. So this certainly is part of al Qaeda and like-minded Jihadists' play book. It is in there. They have done it. They have tried to do it elsewhere. The threat is real.

The second point is that, having said that, we know that we can't protect surface transportation the same way that we protect commercial aviation. It now takes 60,000 screeners, approximately, to check two million passengers who fly from U.S. airports daily. An equivalent nationwide screening system for the approximately—I believe, Senator Sessions, you mentioned—32 million passengers a day who board trains, light rail, commuter trains, subways, and buses in this country would require hundreds of thousands of screeners and would cost tens of billions of dollars. The delays would be enormous, the cost prohibitive. Public transportation would effectively be shut down.

And we also have to keep in mind that any new security measures should provide a net security benefit, that is, not merely displace the risk toward other equally vulnerable targets. We know that keeping terrorists off airliners provides a net security benefit. As terrorists demonstrated on 9/11, a hijacked airliner can be turned into a missile that kills thousands.

Senator Biden, you have outlined some scenarios that can get up to significant casualty levels, and I think what we have to do is address those individually and see what measures we can take realistically—apart from, say, screening, every single passenger—that will enable us to thwart some of those frightening scenarios.

Senator BIDEN. I am not suggesting screening everyone.

Mr. JENKINS. No, I understand that, and I think there may be some procedures as well as some technology around some of the tunnels and other vulnerable infrastructure that we can deploy to at least bring the threat down to, let us say, the level that we face in other public places, whether they are supermarkets, shopping malls, or even long lines of people waiting to go through security measures.

We also have to keep in mind that, given the nature of the threat we face today, whatever steps we take now are likely to become permanent, and therefore we have to make sure that any new security measures are not only effective but also sustainable and efficient. Now, that doesn't mean that nothing can be done to protect surface transportation. In fact, we can do a number of things, and indeed, analysis of previous terrorist attacks and campaigns against mass transit systems have provided a growing catalog of lessons learned and some best practices.

Chief Frazier has already mentioned some of them which are practical measures that make sense. Visible security patrols and visible staff have a deterrent effect. Closed-circuit television coverage has been used extensively in Europe, and with good results. Enlisting employees and the public in surveillance can also be very effective, although the public cannot be expected to assist unless their communications with the authorities are facilitated and calls bring a rapid, visible response. Otherwise, we simply have exhortation, and it doesn't work.

New technology is giving us the ability to detect and diagnose incidents more effectively, to detect explosives, chemicals, biological substances. A lot more can be done through the design of vehicles and facilities to eliminate hiding places, facilitate surveillance, and reduce casualties.

Another option is red-teaming, that is, planning actual terrorist attacks—and Senator Biden, you were giving a pretty good example of red-teaming in some of your introductory comments—that look at how one would actually plan some of these scenarios, do that in great detail, assess the vulnerability, and then use the assessment as a basis for deploying security measures that can thwart those kinds of attacks.

Exercises and drills involving transportation staff, police, and other emergency responders are crucial. This was demonstrated dramatically on September 11, when not only the 200,000-and-some people who are underground in New York on the subway at any given moment on a busy day, but also 60,000 passengers and 300 employees in the stations immediately below the World Trade Center, were safely evacuated, every one of them, and that was because of having good practices in place.

Now, these are good ideas, but this brings me to my fourth point. There is no single best way to implement them. Surface transportation is not a single national system. We are obliged to treat secu-

city in airports in the same way at all 430 airports in the country. But surface transportation is a complex quilt of networks. They vary in size, in mode, in means of providing security; and geography does make a difference. The threat in Duluth is not the same as the threat in the District of Columbia, so we have to allow some flexibility in how we apply these measures.

I think that a best practices approach is the most effective model. In a best practices approach, the Federal Government supports the research, subsidizes the deployment of the technology, provides intelligence, which is critical, augments security when the threat warrants, and assists with emergency response and investigation in the case of a terrorist attack.

The new legislation that you have offered, Senator Sessions, and the proposals of Senators Biden, Specter, and Hatch, by expanding and filling in some of the gaps in the criminal law—whatever it does for the prosecution side, and I am not an attorney, I am not a prosecutor—is useful in that it expands and clarifies the criminal law, it facilitates the investigations and intelligence collection.

I am not always sure that the kind of adversaries we face today are deterred by the death penalty, because we are dealing with some people in some cases who are willing to give up their lives. But I think that facilitating the intelligence collection by opening up some space here in the criminal law is a very useful contribution.

My fifth point is that I think we have to look at this strategically. Since the beginning of the republic, security considerations have been major factors in the development of the nation's transportation system, from the building of the first national road to the creation of the Interstate Highway System. So I think we have to think about a broad national transportation security strategy.

Now, this involves more than simply mandating increased security. It makes security a criterion in the design of new transportation facilities, and Senator Biden, you are quite right in pointing out that we are dealing with infrastructure that was built in the last century and, in some cases, the century before that. A transportation security strategy may encourage the construction of some new transportation infrastructure that is inherently more robust, or that reduces some of the obvious current vulnerabilities, or that has built-in redundancies to reduce disruption.

One thing we have to be careful of is that the transfer of the Transportation Security Agency from the Department of Transportation to the Department of Homeland Security, while that makes sense in terms of consolidating security responsibilities, should not lead to an exclusive reliance on regulation and enforcement as the only ways to mitigate risk. We have to think about this really as a national strategy.

That brings me to my final observation. Certainly, we must do all we can to enhance the ability of our intelligence efforts and law enforcement officials to uncover and thwart terrorist plots, increase security around vulnerable targets, and improve our ability to respond to attacks when they occur. At the same time, however, we must be realistic about the acceptance of risk. We cannot allow fear to become the framework of American governance, and we should be wary of slouching toward a security state in which protected pe-

rimeters, gates, and guards dominate the landscape and irrevocably alter our lives.

Even this august body cannot legislate an end to terrorism. It cannot eliminate all the vulnerabilities from an open society, and it cannot transfer all risks from its citizens to its government, nor should it try. Ultimately, in my view, the strength of this Nation is going to depend not on the thickness of the concrete walls or the severity of the criminal code, but on the courage, self-reliance, and inherent creativity of its free citizens. Thank you.

Senator SESSIONS. Thank you. That was very insightful. We appreciate those comments.

[The prepared statement of Mr. Jenkins appears as a submission for the record.]

Senator SESSIONS. Chief, as I was thinking about your situation, I remembered, I believe Wednesday, I walked down to Union Station to get a bite to eat and they were evacuating the station. Was that something you did and is that something that happens around—I think Paris is having an evacuation today. How do you go about making those decisions and how often does that occur?

Chief FRAZIER. Mr. Chairman, Wednesday's incident was an actual security matter. What happened was, and I was there, what happened was a backpack, a blue knapsack was left by one of the restaurants in the main area of Union Station and it was found by a security officer, who reported it to us. We went and checked, and basically, it had an odor. The odor smelled like fuel.

Based on our procedures that are in place for emergency evacuation, we made notice, formed up the Incident Command Center, and began investigating this matter. We roped off 300 yards to start, or 300 feet to start based on the size of the package, and ultimately received help upon the arrival of the fire department and police authorities to assist us.

Back last June, we had a multi-agency drill at Union Station here in Washington and we had over 120 participants from all branches of government, State, local, and Federal, and put together a solid framework—this is a TSA-sponsored drill—put together a solid framework to improve on what we already had.

So ultimately, we did get the package inspected. It turned out that lighter fluid had been in there, that it had spilled, and that that was what created the foul incendiary type of smell.

How often does it happen? Suspicious packages are found on Amtrak, things that are called to our attention by employees, things that are called to our attention by passengers quite frequently. Three or four, maybe five times a day somewhere on the system, we receive a notification that something is being checked out somewhere, either at a station or on board a train or on our tracks.

Senator SESSIONS. I think Mr. Jenkins mentioned technology. I think I will ask you first about things like surveillance cameras. Are you satisfied you have enough of that? Would you like to expand your capability there? That is just a pretty decent preventive tool, certainly a good investigative tool.

Chief FRAZIER. The level of sophistication of what we have right now goes, for example, perhaps back to 1974. We may have some camera system in some place that is that old. It may be some stuff

we were able to put in in Philadelphia back in the mid-1990s that we are looking to upgrade at this point in terms of CCTV.

We believe that it is a good deterrent, and in fact, we are working with TSA on a pilot in Philadelphia that will deal with the latest technology associated with CCTV and perhaps having an ability to have that technology work to identify things that are unusual so that it can help our operators to review the information and process it.

Is what we have adequate at this point? It is not. We need to, as Mr. Jenkins has indicated, probably have some improvements in terms of CCTV and, of course, in terms of other technologies that are available today.

Senator SESSIONS. Mr. Jenkins, what would you say about technology? What are some of the things that come to mind? I know you haven't issued an official report on these things, but you have had some—I am sure you have thought about it, some things that we maybe could do to go beyond. This is a law enforcement Judiciary hearing, but what could we do to go beyond that to the Transportation Department or some others might consider, and private businesses might consider to make their places of business more safe?

Mr. JENKINS. In 2002, Chief Frazier and I served together on a transportation panel that looked specifically at the issue of applications of technology to countering terrorism. I think one of the interesting findings of that panel was that while there are obviously some areas that we would wish to develop that we are still just pushing right now—in other words, chemical detection—we are making great progress. The detection of chemical substances is still technology on the move. We have some experimental systems that have been deployed.

Detection of biological pathogens is a bit further behind. It is a more complicated technological task, but it is also on the move. We have made great progress in explosives detection, but there, we still deal with the issue that you have to get fairly close to a suspicious object to be able to pick it up. You have to be able to actually run it through a machine or swab it with a piece of gauze to make detection work.

Closed-circuit TV is now on the shelf. To say that we have camera systems in place that were put there in 1974, I mean, that is an archaeological dig in terms of the movement of technology on this stuff.

Senator BIDEN. It is like telling my daughter just got out of college and is working in Philadelphia in the city, that I am going to buy her a black-and-white TV.

Mr. JENKINS. It is. I mean, the cameras, fortunately, have not only improved in quality in terms of their abilities to do things—pan, zoom, tilt—but there is color now, and the resolution is sufficient to qualify for evidence in trial as opposed to showing blurry little black-and-white images. And fortunately, also, the costs have come down.

Another interesting area is bringing together a closed-circuit TV system, which they have done very effectively, for example, in the United Kingdom. To give you an idea of the comparison of our system to theirs, for British Rail in England and the London Under-

ground, according to the last figures I saw, they were installing 5,000 cameras. Now, that is intensive coverage.

To be able to take those cameras the next step and make them smart cameras, we have learned that with software, in fact, the mechanical surveillance system can be taught to recognize normal patterns and to pick out anomalies. That is an area where, in fact, we can take technology further.

In terms of tunnels, which came up several times in our discussion, we are looking at ventilation systems. To be able to rapidly diagnose when something is going wrong is one thing. But, what are you going to do about it? We need to have systems that enable us to vent tunnels, to remove smoke from tunnels. We know from experience in Korea with the recent accidental incident, or from tunnels in Europe, that smoke is the killer. So can we get smoke out of tunnels? Can we get chemical substances out of tunnels?

In some cases, we don't want to vent into the street. I mean, if we have a poison gas, just popping it through ventilators onto pedestrians isn't necessarily going to be an improvement. So that is another area where we can make great strides.

And then, finally, there is the design of the stations and vehicles themselves. Eliminating things that turn to shrapnel in explosions or that produce toxic fumes when burning, designing vehicles that explode in such a fashion that they allow the explosives to vent and reduce the internal pressures, those are some other things we can do.

The interesting finding—and correct me if I am wrong in this—is that we had the technology. We knew what the technology was. The problem was institutional barriers. Cost was part of it, but also a lot of institutional barriers prevented us from an effective deployment of this technology; and beyond that, we still have a tendency, even in airport security, to deploy a machine and attach a human being to it without much thought about the human performance and the human factors. So it is not just a question of deploying technology. We should really be thinking about these things in a much more systematic way than we have done before.

Senator SESSIONS. Thank you. Very good.

Senator Biden?

Senator BIDEN. Thank you very much. And again, Mr. Chairman, I can't tell you how much I appreciate your holding this hearing.

Brian, you may remember, you were here on October 16, back in the bad old days when I was Chairman of this Committee, October 16, 2001, just a little over six weeks, fie, six weeks after 9/11. I reread the testimony. We haven't done anything since this testimony.

And Chief, you are a good soldier, but you are not even close to being able to protect. I have made over 6,800 round trips on Amtrak from Wilmington, Delaware, to Washington, D.C. in 32 years. I am no more safe today than I was before, not because of your not doing your job, but because, in fact, you have probably gotten a lot worse.

Quite frankly, I am going to say something outrageous. I know as much about your institution and you guys as you do. I know more of your guys by name than you do, I bet. Literally, not figuratively.

Chief FRAZIER. I believe that is true.

Senator BIDEN. If you think I am joking, I am not joking.

Chief FRAZIER. I believe that is true.

Senator BIDEN. They have been my guys and women. But let me tell you something. You said here, for example, and I think it is important people know, you have 12 canine teams. How long have you had 12 canine teams?

Chief FRAZIER. The explosive teams were put on in 19—excuse me, in 2001.

Senator BIDEN. In 2001. And all 12?

Chief FRAZIER. Yes.

Senator BIDEN. How many total number of dogs do you have?

Chief FRAZIER. Seventeen.

Senator BIDEN. Seventeen dogs. Now, the idea that—here is my problem, Mr. Jenkins. We have a tendency here to make perfect the enemy of the good. You are a bona fide terrorism expert. Everyone I have spoken to in this country, in Germany, in France, in England, makes several things clear. If we are dealing with, for lack of a better phrase, institutionalized terror, the al Qaedas of the world, they seek, particularly al Qaeda, seek maximum effect. They want to make the news broadcast as horrific as they can possibly make it. Terror is called terror as opposed to war because it is designed to terrorize civilian populations.

Now, what I don't understand is you know and I know and Chief, you know, that there are high-value targets that are very high value. As I said, one Metroliner and one Amfleet full passing each other in a tunnel is more than five full 747s.

Now, here is my problem. Particularly at time of high alert, Brian, why does it not make sense for us to install into a central com remote control television cameras at the entrance and midway and partially through every major tunnel in the Northeast corridor? What is so hard about that? I could get some kid who does the computers in my office to wire that, not figuratively, literally.

Why is it when we go on orange alert, why is it we don't have enough cops for you guys to station, actually 24 hours a day, one guard in front of every tunnel, either end, just to guard? You are not going to stop a train, but you are going to stop someone moving in, dropping a bomb in the middle of it, a guard. You don't need rocket science to deal with some of this stuff.

Remember you used to go through the old Baltimore tunnel and in the middle of the tunnel, you had a guy sitting there in a booth? Do you remember that? There was a reason for that. That was for security. An accident happens in the middle of the tunnel. This is 1940s technology. I am not even asking us to get up to the 21st century.

There are some things I just can't fathom. How many—if we took and hired another 500 police officers, the total cost of that would be infinitesimal compared to the cost of security nationwide, and just made sure that every single major tunnel had guards in front of it. It wouldn't stop something in a train.

But we have another problem. These guys are pretty inventive. It doesn't take much to slide down the bank right next to the Baltimore tunnel and walk in, walk in. You can carry a 100-pound bomb

down there. You just walk it in the middle of the tunnel, a remote control detonator.

So what I am trying to get at, Brian, what is this institutional thing? It is almost like if we cannot do it all, we do nothing. There are more canine patrols in the City of Wilmington, Delaware, than you have on all of Amtrak. We are not going to get to make sure we have every single passenger screened. That is ridiculous, okay.

You have a total of how many Metroliners today in the Northeast corridor, and I picked the Northeast not because it is more important, it is just the most passengers. You can blow up the most people. If we had a canine cop on every train, nothing else, we are talking about putting—which I support and you support U.S. Marshals on as many aircraft as we can get—one canine patrol on every Metroliner, or every crowded train—you wouldn't have to do them all.

Now, will that guarantee that dog will sniff out every single solitary explosive on there? No. Is it a deterrent? Yes. Does it increase more than marginally the possibility we get someone? Remember, these guys didn't use chemical weapons, Brian. They took a computer, they took the Internet, they took an aircraft, and they took fuel in the belly of an aircraft. What do we have to do to learn? How dumb are we? What is the problem?

Mr. JENKINS. When I say institutional barriers, I don't mean that the institution can't figure it out or that somebody is demanding the perfect solution as a barrier against doing some sensible things. The institutional barriers tend to revolve around jurisdictional issues—who is going to be in charge, who is going to do this.

Technologically, you are absolutely right. I mean, look, we strung fiber optics through these tunnels. We have rigged these tunnels so that your cell phones work in the tunnels. We managed to do that.

Senator BIDEN. Yes.

Mr. JENKINS. It is no more difficult to string TV cameras through the tunnels, and we should be doing that. That is not an insurmountable task.

As for explosives detection using canine crews, I might differ with you there, because I would say that if I had an increased number of canines for explosives detection, I would probably be wanting to deploy them more effectively in the stations rather than on the trains.

Senator BIDEN. You are the expert. The only point I am trying to make is that some of the things we could do—for example, I say to you, Chief, you indicated that this is really—you acknowledge it is fundamentally different than airports. In some ways, yes. In other places, wrong.

We are now having proposals coming from the Federal Aviation outfit saying that maybe we should not only have detection when you walk in and put your bag on the plane or when you walk in and you go through the detector to get on the plane. There are proposals now, and you know better than I do, Brian, to have detection before you can walk into the airport. I promise you, Chief, you know it, more people in Grand Central today than in any airport in the United States of America. There are more people in Philadelphia in that city right now in one place in that station at rush hour

than there are—I don't mean in the trains, I mean in the station—than there are at the Philadelphia airport.

If the Philadelphia airport were considering whether or not, before you can walk into the door—we haven't done it, but that is a consideration—before you walk into the door, we are going to check it out, I think it is an institutional bias against rail. If you think I am joking, I am not.

We think of rail like it is somehow another century. Therefore, it is not much of—all you have got to do is watch one of these science fiction movies. They are ridiculous sounding. Just take one of those new trains at 120 miles an hour and hit it from Carrollton. What have you got? Man, you have got yourself a science fiction movie that is not very hard to do.

Now, I really have two questions and then I will stop. To the best of my knowledge, and I don't want to go through all of what we don't have, I don't want to advertise too much here, but to the best of my knowledge, unlike airlines, we do not have extensive security around switching. We don't have extensive security around access to the command and control terminals, where you have got guys sitting there making sure more than one train is not on one track. We don't have any serious security like we do for the air traffic controllers' tower. We don't have that for the similar towers that exist—they are not towers now—for our rail system, East Coast, West Coast, South, North.

And, to the best of my knowledge, basic things like you have 350 police officers and you have them working overtime. By the way, I might add parenthetically, more drugs are transported on our trains heading up the Northeast corridor than all of I-95. Forget the rest. But that is another question.

So here is what I want to know. If you had to, if I said to you, Brian, this may be unfair, but you guys, and you, Chief, you indicated you were on a task force already. What are the most, and you can submit it in writing if you don't want to do it now, what are the most immediate technologically doable security measures that you would take if I said to you, you have a carte blanche, regardless of the cost, but you have to employ these security measures. They have to be able to be employed within the next 6 months. That is all you have got, 6 months. What are the things that you prioritize and do?

The good news is, the bill that I introduced with Senator Hollings and Carper and others passed out of the Commerce Committee today, Chief, and I have never done this before, and I want to thank John McCain for keeping his commitment. It passed out with 14 votes, unanimously. It is \$1,093,000,000 for rail security. It is \$5 million to do a vulnerability assessment of passenger and freight rail.

The second section where we are talking about spending money, it provides right away \$570 million for the New York tunnels, \$57 million in the same period for the Baltimore and Potomac tunnels, \$40 million for the D.C. tunnels, and \$3 million included for primary design for a new tunnel under the Baltimore Harbor.

It also provides \$500,000 to assist families who are victims of rail accidents. It provides \$62 million for improvements in train secu-

city, station security, employment of additional police and security officers, so maybe help is on the way, Chief.

I have written a letter to the Majority Leader a while ago, and I wrote it again, saying I would ask that in light of what we all now know and can't deny, that immediately upon us coming back from the recess, we have a freestanding vote. For 2 years, Brian, I have been unable to get a vote. Two years I have been unable to get a vote on rail security.

So I am going to make it clear. We have a chance to put in motion significant improvements in rail security. I don't want to be the guy a year from now standing on the floor when we have our own Madrid and say, hey, man, we didn't do anything. So I want everybody on notice. There is zero excuse not to bring this bill up and pass it in a day, and I am prepared to debate anybody on the merits of it at all. I will lay you eight-to-five when it comes up for a vote, it will pass 98-2. I don't even know who the two no votes are.

So you may have the ability to do exactly what I am asking you. What do you do? What are your highest priorities immediately relative to security that isn't rocket science?

Chief FRAZIER. Perhaps, Senator, I might start by saying that that bill, we had quite a bit of opportunity to participate in the drafting of that bill and I certainly appreciate your sponsorship of it. I am a little bit reluctant in terms of addressing financial issues here. Frankly—

Senator BIDEN. I am not asking for numbers. I am just saying—I don't mean dollars. If you had a wish list, what do you want? Do you want 300 more cops? Do you want cameras? What are the immediate things, if tomorrow you had the money, not the dollar number, if you had the money, what would you do?

Chief FRAZIER. Well—

Senator BIDEN. You have been thinking about this for a while. You have had panels. You have studied it. You have had recommendations. God love the former Governor of Pennsylvania who is now the Homeland Security Advisor. He keeps telling me he is concerned about it. I keep saying, tell me something. Say something. Step up to the ball. What do you want?

Chief FRAZIER. Senator, I have to just comment a little bit here about the truth of the situation, and that is as it relates for Amtrak itself. Amtrak itself is struggling for financial stability.

Senator BIDEN. Tell me about it. I am the guy that gets your money every year. Forget that. I don't want to know about that. I am asking you a different question. What do you do if you had the money? What is your highest priority now security-wise? What do you need most?

Chief FRAZIER. All right. What we want to do, as is indicated in that security investment plan that we put forward, is to take care of these stations, is our number one priority. You have mentioned Grand Central. Well, we have Penn Station in New York where there are over—

Senator BIDEN. I meant to say Penn Station. That is bigger.

Chief FRAZIER. There are over 500,000, 600,000 people a day in that multi-modal facility. We also have Washington, D.C. We also have Chicago and Philadelphia that we have identified as our pri-

ority majority stations where we need to place security measures in.

We want to add police to those stations. We want to add explosives detection capability. We want to put more dogs into those stations. We want to increase the numbers of radiological pagers that we have that are available to us. We want to continue to work with the first responders in the communities where those stations are located to try and improve how we are doing our business and to mitigate, if we cannot stop the problem from happening in the first place, to mitigate the losses that will result.

Our next area is tunnels. Our next area is to improve the security of tunnels through surveillance equipment, through the deployment of additional fence. Right now, based on Amtrak's own capital dollars, it is extending fence in the Baltimore area to deal with the very issue you were talking about, high-security fence that I observed when I went over to the United Kingdom and some help from our friends over there in terms of what we should do from that standpoint.

We want to improve the security of our trains, just as you have mentioned. I mean, at this point, it would be a sheer luxury to think in terms of any equivalent of a sky marshal on the Amtrak system. We just don't have adequate ability to do that.

So at this point, technology, yes. We want to understand the blast vulnerability of our stations and what we can do to improve their physical ability to withstand a problem and to protect the passengers that use them—

Senator BIDEN. Chief, our time is running out. I want to tell you, I thank you very much, and I know you know more—the only point I was trying to make in asking you that question is I don't think there is a single person sitting in this audience or watching this on television who would say that any use suggested wasn't—that makes sense. That makes sense. And you didn't sit here and say, what I need is new 800,000-pound gates in front of tunnels that open automatically. I don't need new—you are talking about real basic, honest-to-God things, that there is not a serious business in this country doesn't have.

That is the only point in my making you go through that a little bit. It is, I think, close to criminal that two-and-a-half years later, almost 3 years later, after the warnings we have received from our own intelligence community, after what we have recently seen in Madrid, that we are still even debating these basic things. We are talking about a lot of money, but in a \$2-plus trillion budget, \$1 billion over 5 years, wow. We gave the airlines \$15 billion in three weeks.

Can I ask you the same question in two minutes to answer what the highest priority is?

Mr. JENKINS. I will agree with the Chief and with you that the list of things that can be done is a very pragmatic, sensible list. There are no secrets in that. There is a checklist of items contained in the overview that was prepared at the request of Secretary Mineta right after 9/11 that is as valid today as it was two-and-a-half years ago.

I will be happy to also come back to provide you with a more thoughtful answer than I can give in two minutes here, but I would

endorse all of those things. I mean, look, we want to look at major stations, major congregations of people. We want to look at tunnels. That is a critical vulnerability. We want to look at rail conveyance of hazardous materials. There are some obvious areas that we can look at.

At the same time we are looking at those measures, I would say that you could start a red-team to take some of those scenarios that you touched upon in the beginning and make sure that as we spend this money, we are going to cover some of the kinds of things that adversaries may think of.

The final comment I will make, however, is the following. It is really a question for us as a society. To get to where we are in aviation security took us 32 years. What we have now began with the first rule, created 32 years ago, which was that we would have universal passenger screening. Everything that we have done since, in terms of explosives detection, other forms of detection, other procedures that we go through, each one of those relates back to an individual tragedy. We have had hijackings. We have had planes sabotaged. We have had all sorts of catastrophes.

Now, the question for us is, do we have to go through 32 years of catastrophes on rail? Do we need a whole string of Madrids and Paris and London bombings in order to begin to take the security measures, or can we be thoughtful and realize that this is a threat now—and it is—and compress the amount of time so that we can get those measures out there in months or a couple of years as opposed to waiting decades?

Senator SESSIONS. Thank you very much, and congratulations on that move in the Commerce Committee. That is a big piece of legislation. I know it is something you care about.

Senator Hatch, Chairman of this Committee, and Ranking Member Patrick Leahy have submitted statements for the record. They will be made a part of the record, and we will keep the record open for a week for further questions.

Thank you for an excellent discussion, gentlemen. We are adjourned.

[Whereupon, at 4:42 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

NATIONAL RAILROAD PASSENGER CORPORATION

60 Massachusetts Avenue, NE, Washington, DC 20002
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Joe McHugh
Vice President
Government Affairs



June 4, 2004

Honorable Orrin G. Hatch
Chairman
Senate Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Chairman Hatch:

Enclosed are Amtrak's responses to your Committee's questions in regards to the April 8 hearing on 'Keeping America's Mass Transportation System Safe: Are the Laws Adequate?' Further, my office has reviewed the hearing transcript and has no edits for our testimony. If you have further questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Joe McHugh".
Joe McHugh
Vice President
Government Affairs

Enclosures

AMTRAK RESPONSE – SENATOR LEAHY QUESTIONS

1. *One issue you raised in your written statement caused me great concern. Specifically, you have brought to my attention the fact that Amtrak cannot, in some states, like California, directly access law enforcement records systems while performing pedestrian and vehicle investigations. Can you detail what impediments exist such that Amtrak cannot access law enforcement records when necessary to do so for a complete investigation and can you provide suggestions on what can be done to ensure that your officers have access to key and critical law enforcement data?*

It is important to note that this issue is not solely an Amtrak Police issue. No Rail Police can access the California Law Enforcement Telecommunications System (CLETS). CLETS provides up to date, local criminal history (warrants, wanted person etc.) and driver information. Thus, it is an important technological data tool for field officers who are conducting pedestrian and vehicle investigations. In 2002, Amtrak Police attempted to clarify this issue and was advised by the California Attorney General's Office that rail police are not eligible to receive this information directly because rail police are not regarded as a "public agency of law enforcement." See California Government Code Sections 15151 and 15153. Basically, only state, local and sheriff's department personnel have a "right" to receive this information directly, even though Amtrak police officers are fully accredited.

However, state summary criminal history information "may" be provided because Amtrak Police demonstrated a "compelling need" as described in California Penal Code 11105 (C). This "need" is evaluated on a case-by-case basis. Amtrak and other Rail Police Officers have to call the California Department of Justice (DOJ) Command Center and request the information (as opposed to contacting a California local Police Radio system via radio and making the same request). The request is evaluated to determine if it meets a "compelling need." If there is an issue, the Command Center will then contact the California DOJ Record Security Section for a final determination.

As you can imagine, this can create significant officer safety issues because of the length of time that it may take for a response. Amtrak Police have had response time to a "compelling need" request range from 10 to 25 minutes. At a time, when there is evidence that rail transportation may be a target for terrorism, rail police need to be on the same playing field as other state and local police agencies. Direct access to state criminal information databases like the California CLETS system is a prime example of "low hanging fruit" that ought to be rectified.

While I understand that this is a state law issue, I believe that Congress could help by amending the Rail Police statute, 49 USC 28101, to ensure that rail police are on an equal footing with state and local law enforcement. Below is language for consideration:

(b) a police officer who is employed by a rail carrier and certified and commissioned as a police officer under the laws of a state is entitled to access and receive criminal history record information contained in state law enforcement criminal databases in the same manner as police officers employed by state and local authorities; and is eligible, through application of the rail carrier's police department, to receive training, obtain equipment and/or to apply for federal law enforcement grants that are provided to states for distribution to eligible law enforcement agencies or personnel.

2. *Another issue you raised involved federal funding for bulletproof vests and extension of Public Safety Officer benefits to Amtrak Rail Police. As one of the originating sponsors of these important programs, I am very familiar with them. The bulletproof vest program was created to help agencies in small communities. Public Safety Officer benefits were created, in part, to entice more people interested in becoming law enforcement officers, since many small police departments could not provide much in the way of death/injury benefits on their own. What efforts, if any, has Amtrak made to provide its own benefits to rail officers and to designate appropriate funding for the protection of its employees?*

Amtrak as a rail carrier is governed by the Railway Labor Act and operates within that framework for terms and conditions of employment. Amtrak's sworn personnel are unionized and, thus, benefits are negotiated through the collective bargaining process. Finally, like other railroad employees, they are covered under FELA for injuries suffered.

With regard to the Public Safety Officer benefits, the Amtrak Police Department did obtain a legal opinion in 1998 from the Department of Justice, Office of Justice Programs legal counsel indicating that Amtrak sworn personnel "might" be eligible for such benefits on a case-by-case basis. As you know, this opinion does not carry the full weight of law as a statute would. In addition, the Amtrak Police Department did apply for bulletproof vest partnership grants, but was denied and determined to be ineligible. Once again, these issues address **all** Rail Police, not Amtrak only. S. 2168 addresses "law enforcement equity" for police officers of rail carriers and universities and is an example of the issues that need to be addressed for rail police.

With its own funding sources, the Amtrak Police Department has provided the following equipment protections for all its officers:

- Issue Glock Model Semi-automatic firearms
- Issue bulletproof vests
- Issue full face respirators
- Provide gun locks
- Negotiated hazardous duty pay for 2nd and 3rd shifts (much like a shift differential)

In addition, the FY'04 Operating budget for the Amtrak Police and Security Department is \$31.8 million.

AMTRAK RESPONSE - SENATOR BIDEN QUESTIONS

1. *How much has the new security threats post 9/11 cost Amtrak? How much has Amtrak spent responding to those threats?*

Amtrak spent over \$12 million dollars in overtime and related expenses for personnel issues after 9/11. Amtrak's 5-year capital plan has over \$34 Million planned for security related improvements and needs. The Amtrak Police Department has also spent about \$1 million from its federal forfeiture accounts to provide security improvements and equipment upgrades for police officers. As an example, each time the threat level is raised it costs Amtrak \$11,000 a day or \$330,000 a month in extra costs.

2. *How much have you received in additional support to over these costs?*

In 2001, Amtrak received a \$5 million grant for overtime reimbursement. Even though this issue has been raised numerous times in Congressional hearings and meetings between Amtrak and Members of Congress, there has been no additional funding support.

3. *What has the Department of Homeland Security Done to help you?*

The Amtrak Police Department has developed a very close working relationship with the DHS/TSA. My staff and I have regular interaction with TSA personnel on rail security issues and this relationship has been beneficial in my opinion. Below is a list of some matters where DHS/TSA has helped Amtrak:

- Provided review and evaluation of April 10, 2003 security improvement plan submitted by Amtrak President and CEO David L. Gunn
- Provided staff and funding to conduct TRIP program starting on May 1, 2004 which will evaluate screening technologies in a rail environment
- Sponsored two emergency response drills based upon a terrorist incident which involved multiple police, fire and EMS agencies; one was conducted at Washington Union Station in July of 2003
- Sponsored Anti-Terrorism training that was provided to Amtrak Police Management personnel and Amtrak Security Coordinators. Training was done in Wilmington, DE by FLETC staff.
- Coordinated with Amtrak on TWIC Prototype phase with Amtrak's CNOC site as a location for pilot program
- Coordinated with CBP and Amtrak to provide up to date electronic passenger information for international travel
- Selected Amtrak station as a site for video surveillance project
- Provided partial funding and guidance on computer based training program for all Amtrak employees on security awareness (in development phase)

4. What assistance from the federal government – both in terms of resources and coordination – is needed by Amtrak?

With regard to resources, I believe S. 2273, the Rail Security Act of 2004, adequately authorizes funding to meet Amtrak's immediate and critical needs. However, there needs to be the opportunity to receive security funding on an ongoing basis to continually meet the challenges posed by the specter of terrorism in this country.

In addition, all Rail Police need to be placed on an equal footing with their state and local counterparts. Laws should be changed to allow Rail Police to apply for grants and receive benefits that other police officers have received as a matter of course for years. It is important to understand that while Amtrak supports additional security resources, some of these activities will result in increased operating costs going forward. In the past, Congress and other oversight bodies have been emphatic that Amtrak should reduce, not increase, its operating needs.

**POST-HEARING QUESTIONS FOR THE RECORD
COMMITTEE ON THE JUDICIARY,
U.S. SENATE
HEARING ON "KEEPING AMERICA'S MASS TRANSPORTATION SYSTEM SAFE:
ARE THE LAWS ADEQUATE?"**

APRIL 8, 2004

**WRITTEN QUESTIONS SUBMITTED TO S. MARK LINDSEY,
CHIEF COUNSEL,
FEDERAL RAILROAD ADMINISTRATION,
U.S. DEPARTMENT OF TRANSPORTATION**

Questions Submitted by Senator Joseph R. Biden, Jr.

Question 1

Current law prevents carrying dangerous weapons, firearms, explosive or incendiary devices aboard aircraft (e.g., 49 U.S.C. § 46505). In contrast, some federal courts have interpreted federal law (e.g., 18 U.S.C. § 922(e)) to permit a person to carry a loaded gun or explosives on a train or bus with the permission of the conductor or driver, e.g., *United States v. Hartzog*, 983 F.2d 604 (4th Cir. 1993). Federal law does not appear to currently prohibit the mere possession of other dangerous weapons (e.g., knife) on a train or bus, as it does with airplanes.

I strongly agree that we should make sure law enforcement has the maximum statutory and funding resources possible to punish and deter criminal and terrorist attacks against rail travel and other public transportation. But I also believe that government should not pick and choose between whether airplanes or trains get more protection--either in terms of funding for security measures or in our substantive criminal laws. I wonder if we should not give trains and buses the same protections we give to airplanes.

Mr. Mattice testified at the hearing about how his office prosecuted a bus passenger who pulled a knife and tried to assault the bus driver. As I read the current law, had that defendant boarded an airplane with that knife, the mere possession of that knife would have been a federal crime. In contrast, the mere possession of that knife on the bus was apparently not a federal crime. Not until he pulled it out and tried to use it did it become a federal crime. With that background, let me ask several questions:

Question: Do the Justice Department and the Federal Rail[road] Administration believe there is a compelling policy reason why federal criminal law should treat trains and buses different[ly] than airplanes in this area?

Answer: The Administration's 1997 bill to amend 18 U.S.C. § 1992 and add a new mass transportation anti-terrorism provision included a provision to make mere possession of a firearm

a crime; this provision generated a great deal of opposition to the bill, which in fact was not adopted. To improve prospects for passage of rail and mass transportation anti-terrorism legislation, the gun-possession provision was dropped from later Administration bills.

The Federal Railroad Administration (FRA), as a policy matter, agrees that passengers on trains and buses should be as well protected as those on airplanes. That does not mean, however, that the protections should be exactly the same, given the differences in the vehicles and operating conditions.

Possession of firearms on board trains and buses does pose risks to passenger safety, mass transportation operations, and communities through which they operate. Many States have enacted laws regulating, restricting, and punishing the possession of firearms on board trains and buses operating within their jurisdictions. In addition, existing Federal law currently imposes stringent restrictions on the interstate transportation of firearms, which would encompass the transportation of firearms on board such vehicles as trains and buses of the mass transportation common or contract carriers. For example:

The Gun Control Act of 1968 (GCA) at 18 U.S.C. § 922(a)(4) and implementing regulations at 27 C.F.R. § 478.28 require persons (other than Federal firearms licensees) transporting a destructive device, machine gun, short-barreled shotgun, or short-barreled rifle to obtain prior approval from the Bureau of Alcohol, Tobacco and Firearms before the transportation.

The GCA at 18 U.S.C. § 922(e) and implementing regulations at 27 C.F.R. § 478.31 also require passengers aboard common or contract carriers to deliver firearms to the custody of pilot, conductor, or operator for the duration of the trip.

The GCA at 18 U.S.C. § 926A allows individuals to lawfully transport firearms from one State to another via a "transporting vehicle" if the firearm is unloaded and transported in a compartment separate from the passenger compartment, and if the possession of the firearms is lawful in the State where the transportation begins and in the State where it ends. This provision is designed to preempt State laws that would otherwise make possession of the firearm unlawful.

But certainly guns on trains do not pose as great a risk as guns on planes. Any individual hit by a bullet would certainly be hurt as badly or killed as readily in a train as in a plane, but the vehicle and the rest of the passengers and crew would not be endangered to the same extent. A passenger train is not pressurized and would not experience explosive decompression if its walls were breached, as, for example, by a gunshot or bomb. A train is already on the ground and so is not generally at risk of falling from a great altitude. Also, since a train can only operate where there is trackage, the consequences from a hijacker using a train as a weapon is much more limited than in the area of aviation. Furthermore, many passenger train operations can be slowed or stopped should the train engineer fail to respond to an external signal. For example, all trains

(Amtrak, commuter, and freight) operating on the Northeast Corridor main line between Washington, D.C., and Boston, Massachusetts, are required to have an automatic train control system (ATC) designed to slow or stop the train in response to an external signal. All interlockings along the Northeast Corridor have their signals and switches controlled by people not on a train. If a terrorist were to gain control of a train, the interlocking controllers could set the signals to "stop," which would automatically, via the ATC system, bring the train to a stop or enforce a 20-mph maximum speed. No comparable protections exist on aircraft.

Finally, any Federal prohibition against the possession of a firearm while on railroad on-track equipment or a mass transportation vehicle would have to have a nonapplicability clause similar to the clause in the airline statute prohibiting the possession of firearms onboard aircraft (49 U.S.C. § 46505(d)).

Question: In there any reason why we should not absolutely ban the mere possession of—for example—explosives or incendiary devices or other dangerous weapons aboard a train or a bus, as we do with airplanes? (While some courts have interpreted section 922(e) of Title 18 to ban certain weapons on trains, absent the express permission of the conductor, other legal commentaries suggest that provision is merely intended to prevent, for example, using Federal Express to deliver a firearm or ammunition.)

Answer: S. 2289 would prohibit the placement of a destructive substance or destructive device in, on, or near railroad on-track equipment or a mass transportation vehicle with the intent to endanger the safety of any passenger or employee or a railroad carrier or mass transportation provider, or with a reckless disregard for the safety of human life, and without previously obtaining the permission of the railroad. The bill would also prohibit anyone from using a dangerous weapon with the intent to cause death or serious bodily injury to any person who is on the property of a railroad carrier or mass transportation provider that is used for railroad or mass transportation purposes. Further, the bill criminalizes attempts, threats, or conspiracies to engage in these acts. The conduct prohibited by the bill generally captures terrorist or other violent conduct involving railroad on-track equipment and mass transportation vehicles that would jeopardize employee or public safety, or interfere with interstate commerce, and warrant criminal prosecution. FRA does not take a position on whether the bill should be expanded to prohibit the mere possession of a destructive substance or destructive device on board trains and mass transportation vehicles, but would be glad to assist the Committee should it determine such expansion is appropriate.

It is important to note the commuter nature of the light rail and intercity bus systems in that the commuters on such trains and buses include security guards, police officers, and other law enforcement individuals with legitimate work-related reasons for carrying firearms. The group authorized to carry firearms that travels daily through the train and bus systems is much broader and diverse than the group who travel daily through the aviation system. Therefore, S. 2289 is intended to prevent the use of "destructive substances" and "destructive devices," not necessarily firearms.

Nevertheless, the definitions of “destructive substance” and “destructive device” are very broad. The term “destructive substance,” as defined by the bill, “means an explosive substance, flammable material, infernal machine, or other chemical, mechanical, or radioactive device or material, or matter of a combustible, contaminative, corrosive, or explosive nature, except that the term ‘radioactive device’ does not include any radioactive device or material used solely for medical, industrial, research, or other peaceful purposes.” The term “destructive device,” as defined by 18 U.S.C. § 921(a)(4), which the bill incorporates by reference, includes “(A) any explosive, incendiary, or poison gas--(i) bomb, (ii) grenade, (iii) rocket having a propellant . . . , (iv) missile . . . , (v) mine, . . . ; and (C) any combination of parts that are designed or intended for use in converting any device into any destructive device . . . and from which a destructive device may be assembled. * * *” The term does not include any device that is neither designed nor redesigned for use as a weapon. You may wish to consider the definitions of these terms to see whether they satisfy your concerns.

Regarding 18 U.S.C. § 922(e), which was enacted as part of the GCA, FRA believes that Congress intended that provision to “restrict[] the unchecked movement of firearms and ammunition which undermines legitimate efforts to impose reasonable restrictions upon their possession and use.” *U.S. v. Williams*, 485 F.2d 1383, 1385 (4th Cir. 1973), *cert. denied*, 416 U.S. 941 (1974). The GCA thus is an independent statutory scheme designed to combat a different set of pernicious activities. Section 992(e), as well as section 922(f), set forth prohibitions on the manner in which persons may deliver firearms or ammunition via Federal Express or other common or contract carriers.

Question: Both the Justice Department and the Federal Rail[road] Administration testified that we should update the federal law to add biological agents, biological toxins and hazardous materials to this list of prohibited weapons used to attack rail systems. But that would simply say the bad guys cannot commit a violent act using those substances. Again, in the airplane context, we say you one cannot possess those things and get on an airplane in the first place. Is there any good reason why are we treating planes differently than rail when it comes to biological agents, toxins and hazmat?

Answer: S. 2289 would prohibit the placement of a biological agent or toxin in, on, or near railroad on-track equipment or a mass transportation vehicle with the intent to endanger the safety of any passenger or employee or a railroad carrier or mass transportation provider, or with a reckless disregard for the safety of human life, and without previously obtaining the permission of the railroad carrier or mass transportation provider. The bill would also proscribe the release of a hazardous material on the property of a railroad carrier, with the intent to endanger the safety of any person, or with a reckless disregard for the safety of human life. Further, the bill criminalizes attempts, threats, or conspiracies to engage in these acts. FRA believes that these provisions of the bill generally capture terrorist or other violent conduct involving biological agents or toxins and hazardous materials on railroad on-track equipment and mass transportation vehicles that would jeopardize employee or public safety, or interfere with interstate commerce and warrant criminal prosecution. FRA does not take a position on whether the bill should be

expanded to prohibit the mere possession of a biological agent or toxin on board trains and mass transportation vehicles, but would be glad to assist the Committee should it determine such expansion is appropriate.

Trains are the safest way to transport large quantities of hazardous materials. Any statute addressing this subject must be clear that the legitimate transportation of hazardous materials on freight trains in compliance with the law governing such transportation is not proscribed.

With regard to passenger trains, FRA does not believe that possessing certain types of hazardous material that are not deployed, dispersed, or released poses the same risks on trains or buses as opposed to airplanes, given the nature and operation of the vehicles. A passenger train simply does not offer the same opportunities as a passenger aircraft to use as weapons personal hygiene items containing hazardous materials. Railroads operate over a hardened infrastructure and are not subject to the same operating conditions, e.g., pressurized cabins, sensitive navigational equipment, and lightweight mechanical and structural components that apply to aircraft. Railroads have train control systems that preclude or restrict operations when signal indications are not followed, which airplanes do not have. In short, FRA believes that personal hygiene and household products, e.g., hair spray, pressurized shaving cream canisters, and cigarette lighters, do not pose the same level of risk on a train as they do on an airplane. Should a release occur, the risk to occupants on a train would be minimal as opposed to those on an airplane, which could experience significant consequences.

Possession on a train of other hazardous materials could be prosecuted as an attempt or conspiracy to release a hazardous material, depending upon the facts of the case. For example, there would be no legal way for a passenger to carry on a passenger train a container of a substance that is toxic by inhalation.

Nevertheless, FRA is concerned with railroads transporting hazardous materials and passengers in one train consist. The Hazardous Materials Regulations (HMR) thus prohibit railroads from transporting a placarded rail car, transport vehicle, freight container, or tank car in a passenger train. 49 C.F.R. § 174.82. Further, the HMR limits by quantity or prohibits certain hazardous materials from being transported on passenger trains. See 49 C.F.R. § 172.101, Hazardous Materials Table. Any person who knowingly violates a requirement of the HMR may be subject to a civil or criminal penalty. See 49 U.S.C. §§ 5123 and 5124; 49 C.F.R. §§ 209.101 and 219.103, and Appendix B to 49 C.F.R. Part 209. FRA thus believes that the Federal regulations provide sufficient authority governing freight or passenger railroad transportation to protect operations and the public from non-terrorist events.

Question: Regarding the defendant referenced in Mr. Mattice's testimony, does the Justice Department think it should have been able to prosecute the defendant for the mere possession of that knife, as it would have been able to had he boarded a flight at the Chattanooga airport?

Answer: FRA respectfully defers to the Justice Department in response to this question.

Question 2

In 2001, Congress passed a law dealing with the terrorist bombing of "public transportation systems." There, we defined public transportation systems broadly enough, I believe, to cover terrorist attacks with explosives or other lethal devices against either railroads or against mass transit systems, e.g., 18 U.S.C. § 2332f. That provision only addresses terrorist acts while the proposed law discussed at the hearing would apply more broadly to include criminal acts too. But if Congress looks at amending federal criminal laws governing terrorist and criminal attacks against mass transit, let me ask these questions.

Question: Do you believe that section 2332f and similar provisions are sufficient to capture the sorts of terrorist conduct intended?

Answer: FRA agrees that 18 U.S.C. § 2332f and related statutory provisions encompass terrorist conduct that Congress intended to capture with the enactment of the Terrorist Bombings Convention Implementation Act of 2002 (Terrorist Bombings Act), Pub. L. No. 107-197, Title I, § 103, 116 Stat. 724 (2002). We further believe that S. 2289 would cover the activities contemplated in section 2332f and other criminal acts against mass transportation systems without needing to prove that the conduct was an act involving terrorism. As my written statement points out, S. 2289 corrects serious deficiencies in 18 U.S.C. §§ 1992 and 1993 and should, therefore, be promptly enacted.

Question: Both of you mentioned the prosecution of "shoe bomber" Richard Reid. You note that Congress went back and amended section 1993 of Title 18 to make clear that aircraft was included in the definition of "mass transportation vehicle." Are you satisfied that the definition of "public transportation systems" in section 2332f would cover aircraft?

Answer: In 2003, in section 609 of Public Law No. 108-21, Congress amended 18 U.S.C. § 1993(c) by adding the definition of "vehicle," in response to U.S. v. Reid. Section 1993 now covers air, surface, and water modes of mass transportation systems. In enacting the Terrorist Bombings Act, Congress adopted the definition of "public transportation systems" provided by the International Convention for the Suppression of Terrorist Bombings, which the United States ratified in December 2001. The term covers "all facilities, conveyances, and instrumentalities . . . for publicly available services" in transporting persons or cargo. 18 U.S.C. § 2332f(e)(7). The plain reading of the text covers all conveyances, which includes air transportation, in moving persons or freight. We believe that the two statutes read consistently with respect to aircraft or any other vehicle that provides transportation by air. Therefore, we agree that the Terrorist Bombings Act would capture a terrorist act involving use of an aircraft.

Question: The 1994 crime bill, which I helped author, created many of the terrorism provisions in Title 18, and particularly in chapter 113B of the U.S. Code. Are you satisfied that the provisions we've given the Justice Department in that chapter are working as intended? Are they sufficient?

Answer: FRA believes that 18 U.S.C. Chapter 113B, "Terrorism," provides sufficient proscriptions to combat terrorism, but we defer to the Justice Department on the adequacy of the text as applied to prosecutions brought under the statute.

Question

Your written statement notes that "[t]he U.S. Department of Transportation (DOT), the U.S. Department of Homeland Security (DHS), and other Federal agencies have been working with the railroad and transit industries, sharing knowledge, expertise, ideas, and resources to mitigate the terrorist threat to our Nation's railroads and mass transportation systems Federal agencies, working in cooperation with the railroads and mass transportation systems, have been working hard to prevent terrorist attacks against our Nation's railroads and mass transportation systems."

I agree that it is critical that the federal agencies overseeing our mass transportation systems work together, and with the transit systems to prevent attacks from occurring in the first place. Your testimony indicates that your agency and others have been working to prevent future attacks. Let me ask you some very specific questions about your strategy and coordination since 9/11.

Question: What specific steps ha[ve] the Transportation Department and the Federal Rail[road] Administration taken with other federal agencies to prevent future terrorist attacks? What coordination with other federal agencies has taken place?

Answer: FRA's efforts and coordination with other Federal agencies to prevent future terrorist attacks against railroads and mass transportation systems are detailed in Allan Rutter's testimony before the Senate Committee on Commerce, Science, and Transportation on March 23, 2004, which is available on FRA's Web site at <http://www.fra.dot.gov>. I would like to submit that testimony for the record.

Question: Which federal agency has ultimate authority to develop a comprehensive federal strategy to secure both public and mass transportation systems from future terrorist attack?

Answer: The U.S. Department of Homeland Security (DHS) is the Federal agency with that ultimate authority. Under section 101 of the Homeland Security Act of 2002, the primary mission of DHS is to prevent terrorist attacks within the United States, reduce the vulnerability of the United States to terrorism, and minimize the damage and assist the recovery from terrorist

attacks that do occur within the United States. Under 49 U.S.C. § 114, the Transportation Security Administration, which is now part of DHS, is responsible for security in all modes of transportation, including railroads and mass transportation systems.

On December 17, 2003, the President issued Homeland Security Presidential Directive (HSPD) 7, which “establishes a national policy for Federal departments and agencies to identify and prioritize United States critical infrastructure and key resources and to protect them from terrorist attacks.” See HSPD-7, Paragraph 1. In recognition of the lead role assigned to DHS for transportation security, and consistent with the applicable powers granted to TSA by the Aviation and Transportation Security Act, Pub. L. 107-71, 115 Stat. 597 (November 19, 2001), the directive provides that the roles and responsibilities of the Secretary of DHS include coordinating protection activities for “transportation systems, including mass transit, aviation, maritime, ground/surface, and rail and pipeline systems.” See HSPD-7, Paragraph 15. In furtherance of this coordination process, HSPD-7 provides that DHS and DOT will “collaborate on all matters relating to transportation security and transportation infrastructure protection.” See HSPD-7, Paragraph 22(h).

Question: Have you requested any additional financial or other resources to make passenger rail more secure?

Answer: FRA was given funds for, and has hired, a rail security specialist. Given DHS’s leading role and the overlap between FRA’s historic rail safety responsibility and the new emerging rail security concerns, FRA has been identifying and using existing resources to assure that they address both safety and security where possible. Also, FRA has been to a limited extent, reprogramming existing resources to meet specific security needs (e.g., using safety funds to initiate the RAND Corporation’s independent review of Amtrak’s security needs and using FRA safety inspectors to check the security-related plans and preparedness at Amtrak stations). FRA has been working closely with DHS and Amtrak to define security investment priorities, and I expect that in the future these will be represented in specific security-related resource requests.

Question: Have you requested any additional legal authorities to facilitate your work?

Answer: Yes. The Administration’s rail safety reauthorization bills transmitted to the Congress in July 2002 and July 2003 include a provision to clarify that the Secretary of Transportation’s broad authority over every area of railroad safety includes the authority to address threats to rail security. FRA believes that its current authority inherently includes security, but such a clarifying amendment would help FRA to preempt and quickly rebuff any judicial challenges to FRA safety rules and orders that are issued to enhance rail security, and any objections to FRA safety inspectors’ examining vulnerability assessments and security plans of railroad carriers and railroad shippers in cooperation with DHS. A comparable clarifying provision was passed by the Senate in November 2003 (section 205(b) of the Federal Railroad

Safety Improvement Act (S. 1402)), and a similar provision was approved by the Senate Commerce Committee on April 8, 2004 (section 8(b) of the Rail Security Act of 2004 (S. 2273)).

Question: Have you provided Amtrak with any additional resources to help them deal with elevated threat levels – Code Orange alerts, for example – that DHS has announced?

Answer: FRA does not have a separate pool of discretionary funds that can be allocated for specific events such as a Code Orange alert. This agency has used its field inspection force to monitor the preparedness plans of Amtrak's major stations and facilities. Most importantly, FRA and Amtrak are cooperating on an independent third-party assessment of Amtrak's security planning and needs.

Attachment: Testimony of Allan Rutter, Administrator, Federal Railroad Administration, before the Senate Committee on Commerce, Science, and Transportation, March 23, 2004

Questions Submitted by Senator Patrick Leahy

Question 1: It has been reported that the Federal Government is spending \$4.5 billion on aviation security this year but only \$65 million on rail security--even though five times as many people take trains as planes every day. Last year a survey of transit agencies by the American Public Transportation Association identified some \$6 billion in unmet security needs that remain today. What is FRA's position on the \$6 billion in unmet security needs described by APTA and what does FRA expect to do about those needs, if anything?

Answer: The Department of Homeland Security (DHS) is the Federal Government's lead agency on transportation security. FRA defers to DHS on how to deal with the security needs of transit agencies. Of course, FRA has been working with the Federal Transit Administration on commuter railroad security. Our joint efforts are described in FRA Administrator Allan Rutter's March 23 testimony before the Senate Commerce Committee, which I've asked to be submitted for the record.

Question 2: One of the interesting observations made by co-panelist Brian M. Jenkins during the hearing is that the transfer of the Transportation Security Agency [sic] from the Department of Transportation to the Department of Homeland Security separated transportation security from the broader considerations of transportation strategy. Can you address Mr. Jenkins' concerns and what, if anything, your agency can do to ensure that transportation policy is not considered on a separate track from transportation security issues?

Answer: FRA and DHS, including TSA, have been coordinating on a number of issues. FRA always brings to bear with TSA the larger issues of transportation policy.

Question 3: Just over seven months ago, the General Accounting Office reported on concerns expressed by a number of representatives from transportation industry and State and local government associations. These groups told GAO that they are not included in government decision-making processes, such as the development of security standards for mass transportation. They explained that clarifying Federal roles and coordinating Federal efforts is critical because, as of that time, their members had not been informed which agency they should contact regarding security concerns or for oversight purposes. Some representatives from the transportation industry and State and local government associations also noted that they have received conflicting messages from the different Federal entities. It is very troubling that a real or perceived lack of information sharing and interagency cooperation within the Federal Government could remain an issue two years after September 11. Please discuss what FRA's response is to these concerns and what policies and procedures are in place to ensure coordination and communication among relevant government and private players in the transportation industry?

Answer: FRA tries hard to communicate and coordinate with its regulated community. For example, FRA's primary venue for developing railroad safety regulations is the agency's

Railroad Safety Advisory Committee, or RSAC. It is composed of representatives of rail management, rail labor, rail suppliers, and the participating State rail safety programs. We regularly reach out to its members on regulatory and other issues. DHS, however, has the lead responsibility for transportation security matters, so we suggest that you direct your question to DHS.

Question 4: The Surface Transportation Information Sharing and Analysis Center is a Federal program that has as one of its mandates coordination between government and private industry on information sharing and threat assessment. I am advised by concerned first responders that small transit operators and railroads cannot afford to participate. Can you address this concern directly and advise what, if anything, the Department of Transportation's and FRA's views are on this important initiative?

Answer: DHS is the lead agency for the Surface Transportation Information Sharing and Analysis Center (ST-ISAC). FRA, at no cost to the industry, provides the ST-ISAC, the Association of American Railroads, the American Public Transportation Association, railroad labor, and The American Short Line and Regional Railroad Association, with current threat and security bulletins. FRA receives classified or sensitive information from intelligence and law enforcement sources about potential security threats and then disseminates this information to railroad and transit police and other relevant security officials via secure communications systems. The costs that transit operators and railroads are complaining about come from the trade associations contracting with security companies to provide specialized analysis and planning efforts beyond the traditional mission of the ST-ISAC.

Question 5: There are a number of pending bills, including the National Defense Rail Act, S.104 and the Arrive 21 Act, S.1961, introduced by Senator Hollings, and both of which I have co-sponsored to address rail security and funding issues that should be getting more attention in the United States Senate. What are your agencies' views on these important pieces of legislation?

Answer: On April 7, DOT provided its views to Senator McCain on the Rail Security Act of 2004, S. 2273. I would like to submit that letter for the record.

Attachment: DOT views letter on the Rail Security Act of 2004 (S. 2273)



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 25, 2004

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Attached are the responses to follow-up questions submitted to Mr. Harry S. Mattice, United States Attorney, Eastern District of Tennessee, U.S. Department of Justice, following the April 8, 2004, hearing on "Keeping America's Mass Transportation System Safe: Are the Laws Adequate?" Please do not hesitate to contact this office if we may be of further assistance.

Sincerely,

A handwritten signature in cursive script that reads "William E. Moschella".

William E. Moschella
Assistant Attorney General

Attachments

cc: The Honorable Patrick J. Leahy
Ranking Member

Questions from Senator Joseph R. Biden, Jr.

Question 1

Current law prevents carrying dangerous weapons, firearms, explosive or incendiary devices aboard aircraft (e.g., 49 U.S.C. § 46505). In contrast, some federal courts have interpreted federal law (e.g., 18 U.S.C. § 922(e)) to permit a person to carry a loaded gun or explosives on a train or bus with the permission of the conductor or driver, e.g., *United States v. Hartzog*, 983 F.2d 604 (4th Cir. 1993). Federal law does not appear to currently prohibit the mere possession of other dangerous weapons (e.g., knife) on a train or bus, as it does with airplanes.

I strongly agree that we should make sure law enforcement has the maximum statutory and funding resources possible to punish and deter criminal and terrorist attacks against rail travel and other public transportation. But I also believe that government should not pick and choose between whether airplanes or trains get more protection - either in terms of funding for security measures or in our substantive criminal laws. I wonder if we should not give trains and buses the same protections we give to airplanes.

Mr. Mattice testified at the hearing about how his office prosecuted a bus passenger who pulled a knife and tried to assault the bus driver. As I read the current law, had that defendant boarded an airplane with that knife, the mere possession of that knife would have been a federal crime. In contrast, the mere possession of that knife on the bus was apparently not a federal crime. Not until he pulled it out and tried to use it did it become a federal crime. With that background, let me ask several questions:

Does the Justice Department and the Federal Rail Administration believe there is a compelling policy reason why federal criminal law should treat trains and buses different than airplanes in this area?

Answer: The Justice Department (the Department) believes that passengers on trains and buses should be as well protected as passengers on airplanes. But given the differences between these types of vehicles as well as their operating conditions, it may not necessarily be appropriate to extend all of the restrictions currently applicable to airplanes to trains and buses as well. For example, as the Federal Railroad Administration (FRA) has pointed out, airplanes, unlike trains, have pressurized cabins, sensitive navigational equipment, and lightweight mechanical and structural components. Also, trains, unlike airplanes, have control systems that preclude or restrict operations when signal indications are not followed.

The Department stands ready to work with Congress to ensure that the criminal laws adequately protect all passengers using mass transportation systems. We are willing to consider any amendments to S. 2289 or H.R. 4143, an identical bill that has been introduced in the House of Representatives by Congresswoman Capito, or separate legislative proposals that would accomplish this goal.

Is there any reason why we should not absolutely ban the mere possession of - for example - explosives or incendiary devices or other dangerous weapons aboard a train or a bus, as we do with airplanes? (While some courts have interpreted section 922(e) of Title 18 to ban certain weapons on trains, absent the express permission of the conductor, other legal commentaries suggest that provision is merely intended to prevent, for example, using Federal Express to deliver a firearm or ammunition.)

Answer: The Department supports S. 2289 and H.R. 4143, which would prohibit the placement of a destructive substance or destructive device, including explosive or incendiary devices, in, upon, or near railroad on-track equipment, or a mass transportation vehicle, with the intent to endanger the safety of any passenger or employee of a railroad carrier or mass transportation provider, or with a reckless disregard for the safety of human life, and without previously obtaining the permission of the railroad carrier. S. 2289 and H.R. 4143 would likewise prohibit anyone from using a dangerous weapon with the intent to cause death or serious bodily injury to any person, who is on the property of a railroad carrier or mass transportation provider, that is used for railroad or mass transportation purposes. The bill further criminalizes attempts, threats, or conspiracies to engage in any of the acts described above.

At this point, the Department does not have any position as to whether Federal law should ban the mere possession of any explosive or incendiary device or other dangerous weapons aboard a train or bus. However, the Department would be happy to study and comment on any specific proposals that Congress may wish to develop in this area.

Both the Justice Department and the Federal Rail Administration testified that we should update the federal law to add biological agents, biological toxins and hazardous materials to this list of prohibited weapons used to attack rail systems. But that would simply say the bad guys cannot commit a violent act using those substances. Again, in the airplane context, we say you one cannot possess those things and get on an airplane in the first place. Is there any good reason why are we treating planes differently than rail when it comes to biological agents, toxins and hazmat?

Answer: The Department supports S. 2289 and H.R. 4143, which would prohibit the placement of a biological agent or toxin in, upon, or near railroad on-track equipment, or a mass transportation vehicle with the intent to endanger the safety of any passenger or employee of a railroad carrier or mass transportation provider, or with a reckless disregard for the safety of human life, and without previously obtaining the permission of the railroad carrier. The bill would also prohibit the release of a hazardous material, or biological agent, or toxin on or near the property of a railroad carrier or mass transportation provider with the intent to endanger the safety of any passenger or employee of a railroad carrier or mass transportation

provider, or with a reckless disregard for the safety of human life, and without previously obtaining the permission of the railroad carrier.

As for the question of whether the possession of biological agents, toxins, and hazardous materials should be treated differently on trains as opposed to airplanes, the Department of Justice defers to the expertise of the FRA, and the FRA has taken the view that the mere possession of certain types of hazardous materials on trains does not pose the same danger as does the possession of those same materials on airplanes.

Regarding the defendant referenced in Mr. Mattice's testimony, does the Justice Department think it should have been able to prosecute the defendant for the mere possession of that knife, as it would have been able to had he boarded a flight at the Chattanooga airport?

Answer: As indicated above, the Department does not have a position as to whether Federal law should prohibit the mere possession of a knife on a bus. The Department, however, would be happy to study and comment upon amendments to S. 2289 and H.R. 4143, or separate proposals Congress may wish to develop in this area.

Question 2

In 2001, Congress passed a law dealing with the terrorist bombing of "public transportation systems." There, we defined public transportation systems broadly enough, I believe, to cover terrorist attacks with explosives or other lethal devices against either railroads or against mass transit systems, e.g., 18 U.S.C. § 2332f. That provision only addresses terrorist acts while the proposed law discussed at the hearing would apply more broadly to include criminal acts too. But if Congress looks at amending federal criminal laws governing terrorist and criminal attacks against mass transit, let me ask these questions.

Do you believe that section 2332f and similar provisions are sufficient to capture the sorts of terrorist conduct intended?

Answer: The Department is satisfied with the current language in 18 U.S.C. § 2332f, and has not proposed or expressed support for any proposal to amend that statute. That statutory provision can serve as a useful tool for prosecutors in cases involving certain types of terrorist attacks on public transportation systems (those involving the use of explosives or devices releasing toxic chemicals, biological agents, toxins, radiation, or radioactive materials). The Department believes, however, that there are currently deficiencies with both 18 U.S.C. § 1992 and 18 U.S.C. § 1993, and that those deficiencies could hinder the Department in prosecuting certain terrorist attacks against railroads or other mass transportation systems, or in securing the appropriate punishment for those perpetrating such attacks. S. 2289 and H.R. 4143 would correct these deficiencies, and

the Department strongly supports its quick enactment.

Both of you mentioned the prosecution of "shoe bomber" Richard Reid. You note that Congress went back and amended section 1993 of Title 18 to make clear that aircraft was included in the definition of "mass transportation vehicle." Are you satisfied that the definition of "public transportation systems" in section 2332f would cover aircraft?

Answer: The term "public transportation systems" is defined in 18 U.S.C. § 2332f(e)(7) as "all facilities, conveyances, and instrumentalities, whether publicly or privately owned, that are used in or for publicly available services for the transportation of persons or cargo." This definition thus clearly covers aircraft that are used in the transportation of persons or cargo so long as those services are available to the public.

The 1994 crime bill, which I helped author, created many of the terrorism provisions in Title 18, and particularly in chapter 113B of the U.S. Code. Are you satisfied that the provisions we've given the Justice Department in that chapter are working as intended? Are they sufficient?

Answer: The tools provided by Congress in chapter 113B of Title 18 of the U.S. Code have been essential to the Department's efforts in the war against terrorism. In particular, the Department has extensively utilized the "material support" statutes, 18 U.S.C. §§ 2339A and 2339B, in recent years, and those statutes have been a critical part of the Department's strategy to prevent terrorist attacks before they occur. Since September 11, 2001, Department has charged over 50 defendants with offenses under those statutes in 17 different judicial districts.

The Department, however, also believes that Congress needs to provide prosecutors and investigators with additional tools to enable them to more effectively combat our nation's terrorist enemies. For example, the Department supports extending existing administrative subpoena authorities into terrorism investigations, presumptively denying pretrial release to persons charged with a Federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5), and making death-penalty eligible all Federal crimes of terrorism or acts of international or domestic terrorism when such conduct results in death. The Department also has expressed a willingness to work with Congress on revising the material support statutes in response to recent court decisions holding key terms in those statutes to be unconstitutionally vague.

Question 3

Your written statement notes "[t]he protection of mass transportation and railroad systems obviously requires a multifaceted approach. In my testimony today, however, I would like to focus on one critical element of any strategy for safeguarding our nation's railways [the criminal laws to punish/deter violent acts]."

I agree that it is critical that the federal agencies overseeing our mass transportation systems work together, and with the transit systems to prevent attacks from occurring in the first place. Your testimony indicates that your agency and others have been working to prevent future attacks. Let me ask you some very specific questions about your strategy and coordination since 9/11.

What coordination has the Justice Department taken with other federal agencies has taken place?

Answer: The Department coordinates extensively with other Federal agencies, as well as state and local law enforcement, in order to detect and disrupt terrorist plots, including plots that may be directed against mass transportation systems. Perhaps the best examples of such coordination are the 84 Joint Terrorism Task Forces (JTTFs) currently operating throughout the United States. JTTFs are teams of state and local law enforcement officers, Federal Bureau of Investigation (FBI) agents, and other Federal agents and personnel who work shoulder-to-shoulder to investigate and prevent acts of terrorism. These task forces are important "force multipliers" in the war on terror, pooling multi-agency expertise and ensuring the timely collection and sharing of intelligence absolutely critical to prevention efforts.

Federal participants in the JTTF Program include the U.S. Citizenship and Immigration Services, U.S. Secret Service, U.S. Department of Commerce, U.S. Department of Energy, U.S. Transportation Security Administration, Central Intelligence Agency, U.S. Environmental Protection Agency, Naval Criminal Investigative Service, U.S. Marshals Service, U.S. Customs & Border Protection, U.S. Coast Guard, Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Border Patrol, U.S. Department of State/Diplomatic Security Service, Postal Inspection Service, Internal Revenue Service, Federal Protective Service, Department of Interior's Bureau of Land Management, U.S. Nuclear Regulatory Commission, U.S. Capitol Police, Federal Bureau of Prisons, Air Force Office of Special Investigations, U.S. Park Police, Treasury Inspector General for Tax Administration, and the Defense Criminal Investigative Service. Although the first JTTF came into being in 1980, the total number of task forces has nearly doubled since September 11, 2001. Today, there are 84 JTTFs, including one in each of the FBI's 56 main field offices and 28 in smaller offices. More than 3,300 personnel work on these task forces nationwide.

In addition, in 2002, the FBI created a National Joint Terrorism Task Force at its command center in Washington, D.C. Nearly 30 agencies are represented, spanning the fields of intelligence, public safety, and Federal, state, and local law enforcement. The National JTTF collects terrorism information and intelligence and funnels it to the 84 JTTFs, various terrorism units within the FBI, and partner agencies. Agency representatives also help the FBI with terrorism investigations.

The Department's commitment to coordination is also evidenced by numerous other initiatives, including the Department's participation in the Terrorist Threat Integration Center (TTIC) and Terrorist Screening Center (TSC).

Which federal agency has ultimate authority to develop a comprehensive federal strategy to secure both public and mass transportation systems from future terrorist attack?

Answer: The Department of Homeland Security (DHS) is the Federal agency with the ultimate authority to secure both public and mass transportation systems from future terrorist attacks. Under section 101 of the Homeland Security Act of 2002, the primary mission of DHS is to prevent terrorist attacks within the United States, reduce the vulnerability of the United States to terrorism, and minimize the damage, and assist the recovery from terrorist attacks that do occur within the United States. Under 49 U.S.C. § 114, the Transportation Security Administration, which is now part of DHS, is responsible for the security all modes of transportation, including railroads and mass transportation systems. However, if any terrorist attack covered by either 18 U.S.C. § 1992, which prohibits the wrecking of trains, or 18 U.S.C. § 1993, which prohibits terrorist attacks and other acts of violence against mass transportation systems, were to occur, the Attorney General would have primary investigative authority over the crime as provided by 18 U.S.C. § 2332b(f).

Have you requested any additional financial or other resources to make passenger rail and other mass transportation systems more secure?

Answer: Since the terrorist attacks of 2001, the Department has requested, and Congress has appropriated, significant increases in funding for counterterrorism programs. For example, the Department of Justice's counterterrorism budget increased 226% from 2001 to 2003, and the budget for the entire FBI increased 32% during that timeframe. These additional funds have allowed the Department to more effectively detect and disrupt terrorist plots, including plots that may have been directed against mass transportation systems.

Have you requested an additional legal authorities to facilitate the protection of mass transportation systems? If so, what specific legal authorities?

Answer: The Department supports S. 2289 and H.R. 4143, which as I indicated in my testimony, would expand the scope of legal protection provided to mass transportation and railroad systems. A review of the specific legal authorities contained in that legislation may be found in my written testimony.

Questions from Senator Patrick Leahy

1. **I have been following with interest your office's prosecution using Section 1993 of Title 18, a criminal provision I drafted and that was passed in the PATRIOT Act. Section 1993 prohibits terrorist attacks and other acts of violence against mass transportation providers. I understand that you have charged an individual in Tennessee under Section 1993 based on allegations that he wielded a knife on a Greyhound bus. I assume that the defendant is being charged under subparagraph (a)(5) and that he is facing a maximum life sentence because passengers were on the bus at the time.**

- (a) **Is there any evidence that the act involved or was intended to promote a federal crime of terrorism and/or that the enhancement provided under Section 3A1.4 of the U.S. Sentencing Guidelines will be applicable?**

Answer: There is presently insufficient information available to this office to permit it to assert that the conduct involved in the alleged criminal act charged pursuant to 18 U.S.C. § 1993 constituted a "Federal crime of terrorism" as that term is defined in 18 U.S.C. § 2332(g)(5). Because that definition depends upon the subjective intent of the defendant, however, and because this office has been unable to question the defendant, the ultimate determination as to whether the conduct involved constitutes a "Federal crime of terrorism" must await the conclusion of the proceedings.

- (b) **I have expressed concern lately that the Department of Justice has been overly classifying federal prosecutions as terrorism cases when the underlying facts do not, in fact, involve terrorism. Can you tell me how this particular prosecution was categorized at the time it was authorized at the U.S. Attorney's Office and how the prosecutors are reporting their time on this case?**

Answer: Because the conduct of the defendant which gave rise to these charges involved threatening the lives of a number of passengers using a public, mass transportation conveyance, the file on the case was initially opened as an Anti-Terrorism/Violent Crime matter. The prosecutors assigned to the case have been reporting their time under a domestic terrorism category in the USA-5 system.

**Hearing Before the Senate Judiciary Committee On
“Keeping America’s Mass Transportation System Safe:
Are the Laws Adequate?”
April 8, 2004**

**QUESTION BY SENATOR PATRICK LEAHY
FOR BRIAN M. JENKINS**

1. One of the interesting observations you make in your statement is that the transfer of the Transportation Security Agency from the Department of Transportation to the Department of Homeland Security separated transportation security from the broader considerations of transportation strategy. Can you explain this issue in more detail and tell me what you would do to ensure that security and transportation strategy does not operate, so to speak, on separate tracks? Are your proposals being given appropriate consideration by relevant agencies within the federal government?

SUBMISSIONS FOR THE RECORD

Opening Statement of Senator Joseph R. Biden, Jr.
Judiciary Committee Hearing
“Keeping America’s Mass Transportation System Safe: Is the Law Adequate?”
April 8, 2004

Mr. Chairman, thank you for holding this very important hearing.

One month after 9/11, this Committee gathered for a similar hearing which I chaired on “Defending America’s Transportation Infrastructure.”

At that time, we heard from the nation’s leading counter terrorism experts on the very real threats posed to railroads, highways, and ports.

At that hearing, I said: *“we need to anticipate the threat that may come - not just in belly of a plane - but in the hold of a ship, the dark of a tunnel, or the span of a bridge.”*

I also stated that *“airports and airplanes are like Fort Knox when compared with other forms of transport..”*

Unfortunately, two and a half years later, almost nothing has changed, particularly when it comes to rail security.

Several weeks ago, we saw Madrid, the horror of a devastating attack carried out with precision and deadly results. Our hearts goes out to the victims and their families.

But how long before it happens here? How long before it’s New York or Philadelphia? How long before it’s a tunnel under a harbor? How long?

Those horrific attacks in Spain remind us here what we discussed at those hearings back in 2001: It’s just a matter of time until terrorist target the American rail system.

We know that terrorists learn from each attack, and that they tend to go back to targets they have previously identified but not yet successfully hit.

Just last week, the FBI and the Department of Homeland Security warned local law enforcement agencies that terrorists might try to bomb rail lines and buses in major U.S. cities this summer. So today’s hearing could not be more timely.

But literally before the dust had cleared after the attacks on the World Trade Center, Congress took action to beef up airline security – to the tune of \$3 billion.

And we gave them another \$12 billion in financial assistance, something passenger rail will never see, Mr. Chairman.

But when I tried to attach an amendment on Amtrak security to that airline bill, Mr. Chairman, I was told that was not the right time. And even though Senator McCain and Senator Hollings moved Amtrak security legislation out of their Commerce Committee, that was the last we heard of it.

It was blocked from moving to the Senate floor. Even when I held up Department of Transportation nominees, the Administration would not support moving that legislation.

The last Congress adjourned, and this Congress convened, with no action. Seasons have come and gone – years have come and gone, and still no significant action on rail security.

The Congress has not moved. The Administration has not moved. The Department of Homeland Security has not asked for an extra dime to make passenger rail or mass transit safer.

We know that while we sit here today, somewhere in this country someone is planning an attack on our commuter and passenger rail system. The FBI has warned us. Homeland Security officials have warned us.

But we are still without a national policy, still without new resources, to meet that threat.

Earlier today, the Commerce Committee reported out legislation to begin that process. It builds on the legislation I first brought to the Senate floor two and a half years ago. But at \$1 billion, I believe that it will only be a first step.

I thank you, Mr. Chairman, for your leadership in bringing us together here today, to discuss your legislation to protect our rail systems. We are going to need all of the tools we can get to deal with this problem.

And I have been joined by a dozen Senators from key port states to try and pass broad protection for our seaports.

But we all agree that it is not enough to punish terrorists and other criminals for attacking mass transportation systems – we need to identify and prioritize the vulnerabilities to these systems; and we need to provide the resources for securing the systems.

Look folks, the time to act is now. Not tomorrow. Not the next day. Not next year. Now.

We know a lot about the basics of physical security, the things we can do right away to make that system safer.

More dogs to sniff for explosives. We need dogs to roam up and down the aisles and through the terminals and tunnels. We need better lighting, closed-circuit television surveillance, fencing – nothing fancy or experimental, just resources to do what we already know can work.

And we need more transit cops in the stations and on the trains. Last Congress I held hearings on how more cops on the beat results in a drop in crime. Increased police presence in our transit system can help deter violent attacks.

That is one thing we can do throughout the system to make it much safer. Our Commerce Committee bill moves in that direction.

The other top priority, Mr. Chairman, has to be securing the most vulnerable and most valuable targets. That legislation directs the Department of Homeland Security to do that.

We know that the targets with the highest payoff for terrorists are the ones that have the greatest potential for both catastrophic levels of casualties and stunning symbolic effect.

And where does that lead us? Directly to the six tunnels under New York City, heading into Penn Station.

They are just that kind of target.

The newest was built in 1910, long before the kinds of threats we are discussing today could even be imagined.

And frankly, we're sitting on one right now. It's the tunnel that runs right here under Capitol Hill – under these Senate Offices. Under the Supreme Court of the United States. Under the House Office Buildings.

It wouldn't take a high-tech explosive. It wouldn't take a dirty bomb to do the kind of massive damage that terrorists want.

It would just take a small explosion on a freight train carrying some everyday hazardous cargo like chlorine, and another date would join December seventh and September eleventh in infamy.

On any given day, Mr. Chairman, the number of people moving in and out of Penn Station in New York is the equivalent of over a thousand Boeing 767's – if they were in airplanes instead of trains, they would be protected by a new security system.

Or put it this way - as the *Wall Street Journal* noted earlier this week – there are more rail passengers moving through Penn Station in a given day than in all 3 metropolitan New York airports combined!! Yet, where are our priorities?

As our witnesses Brian Jenkins notes in his testimony, every day about 2 million U.S. airline passengers are checked by nearly 60,000 airport screeners.

In contrast, we have 26 million passengers nationwide who travel on trains, subways, and

buses every day and who receive virtually no screening. None. Nothing.

They walk freely between metro rail systems and interstate lines and nobody checks them. They don't ask for a ticket or identification once you're in the system.

I fully understand and appreciate that, while we cannot create a parallel screening system for non-aviation passengers, the numbers point out the staggering challenge we face in securing mass transit.

But enough from me.

I look forward to hearing from our witnesses today on how we can better prevent a devastating terrorist attack, as well as the laws and additional resources they need to prevent and punish those attacks.

Thank you, Mr. Chairman.

PREPARED STATEMENT
OF ERNEST R. FRAZIER, SR., ESQ.
AMTRAK, CHIEF OF POLICE AND SECURITY DEPARTMENT
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

APRIL 8, 2004

**HEARING ON KEEPING AMERICA'S MASS TRANSIT SYSTEMS
SAFE, IS THE LAW ADEQUATE?**

Mr. Chairman and Members of the Senate Judiciary Committee, I would like to thank you for the opportunity to provide comment and information on matters involving rail security in the United States.

CURRENT STATE OF SECURITY

First, before I address security issues, I believe that it may be helpful for the Committee to know a little about Amtrak and its Police and Security Department. Amtrak is the nation's only intercity passenger rail transportation company and operates over 300 trains per day over some 22,000+ miles of rail with approximately 540 Stations in 46 states. Amtrak carried over 24 million passengers in the last fiscal year. Like rail transportation systems worldwide and mass transit systems in the United States, Amtrak functions in a very "open" transportation environment. Because of advantages such as easy access, convenient locations and intermodal connections, rail and mass transit systems are completely different from the structure and organization of the airline transportation and airport industry. As a result, the security framework that works ideally in the airport setting is not transferable to the rail station system.

A prime example of this dichotomy can be observed by looking at the Amtrak service route. In Penn Station, New York there are literally hundreds of thousands of people using the facility on a daily basis with passengers boarding and unboarding trains that are operated by Amtrak, LIRR and New Jersey Transit commuter trains. Penn Station is a vast, bustling intermodal transportation facility with detailed passenger planning coordinated with the dispatch, arrival and departure of trains on a minute-by-minute precision basis. In addition, Amtrak also has numerous stations that are

unmanned or are merely platforms that are located throughout its national service route. Because of this diverse and complex organization, any delays built into this framework with security regulations would drastically affect the operation of rail transportation and the valued openness of its environment. While this certainly presents formidable security challenges here in the United States as well as in other countries throughout the world, these elements are also the key reasons why rail and mass transit systems remain as popular and useful transportation modes.

The Amtrak Police Department has 342 sworn officers with most of its security force located in the Northeast Corridor where Amtrak runs and operates the tracks and infrastructure. In 1992, it received the distinction of being the first national law enforcement agency accredited by the prestigious Commission on Accreditation of Law Enforcement Agencies (CALEA) and has been recredited in 1997 and 2002. The Department has oversight responsibility for the planning, assessment and evaluation of Amtrak's passenger, critical infrastructure, and station security, emergency response plans and operations.

Though the Amtrak Police Department is a traditional police force that does not focus on counter terrorism, since September 11, 2001, our department has worked to develop terrorism-based vulnerability and threat assessments, emergency response and evacuation plans, as well as security measures that address not only vandalism and other forms of street crime but the potential for explosion and blast effects at critical infrastructure locations. Amtrak has also developed a Security Threat Level Response Plan (ASTLRP) that mirrors the HSAS and requires Amtrak to engage in specific security countermeasures according to the existing threat level. To effectively engage in

these responsive measures, Amtrak also created a Security Coordinator Program. Within each Amtrak division, a Security Coordinator works closely with Amtrak Police and Security personnel to review the security components and steps of the ASTLRP and to ensure that employees within their division are undertaking the required steps. Amtrak reinforces security messages and guidelines through this program and has also established a Security Information Center to increase employee awareness about security issues and to directly provide security tips, bulletins and specific information on security policies and procedures.

Amtrak has also increased its police canine patrols by adding twelve explosive detection canine teams to conduct random sweeps of baggage rooms, train platforms and stations. The Police Department has also purchased full-face respirators for all sworn personnel and deployed these devices for Amtrak's first responders to protect against a CBR attack. In major stations, gamma/neutron radiological detectors have also been deployed to address radiological threats. Finally, Amtrak has instituted a practice of conducting random photo identification for passengers purchasing tickets and instituted a plan for placing weight restrictions on baggage at certain levels of heightened security.

As part of its ongoing security efforts, the Amtrak Police Department does budget for elevations in the HSAS because manpower costs during an "Orange" level alert are roughly \$11,000 per day. However, there have been so many days this fiscal year already at this alert level that Amtrak is coming close to surpassing its reserve budget. Also, such a focus on counter terrorism makes Amtrak less effective in providing its general police service to its travelers and stations users.

Though Amtrak continues to prepare to prevent an attack on our rail system, we also recognize that we must stand ready to manage an incident if and when there is some form of attack. Through our Office of Emergency Preparedness we conduct training for first responder agencies (over 21,000) situated along the Amtrak service route. We have purchased a public safety database that lists each police, fire and emergency rescue agency in order to facilitate state and local emergency response and to establish a clear record of agency training. The Amtrak Police and Security Department has also developed close working relationships with our federal partners: DHS, TSA, DOT, and FRA to ensure effective communications exist and that our security efforts are coordinated.

Amtrak is working with FRA to arrange for and conduct blast vulnerability studies of train equipment and is working with DHS, FRA and TSA to develop a basic security awareness training course for all Amtrak employees. There have also been numerous collaborations with the above agencies that address rail security matters. Some of these initiatives include Land Transportation Anti-terrorism training that was provided by FLETC to Amtrak Police personnel and its Security Coordinators as well as two emergency response drills in which scores of federal, state and local agencies conducted exercises related to a terrorist incident. All of these initiatives were sponsored by TSA.

ADDITIONAL LEGAL ENHANCEMENTS

With regard to criminal law sanctions, Amtrak agrees with the language of S.1608 that reconciles criminal acts of terrorism against mass transit systems and amends the Railroad Section of the United States Crimes Code by including passenger rail. Any act

of terrorism committed against a passenger and/or mass transit rail system should be treated in the same fashion. This legislation would make it clear that acts of terrorism, whether by explosives, biological or radiological attack, would be dealt with in a uniform and straightforward manner.

While criminal sanctions, such as S.1608, are important tools to have in this new security environment, I would also ask this Committee and your colleagues in the Senate and House to address some basic legal matters that confronts Rail Police across the Nation and Amtrak. Specifically, Rail Police are not on the same equitable level as state, local and mass transit police in other key areas, such as, ability to participate in the bulletproof vest partnership program, entitlement to Public Safety Officer benefits and in some states, like California, the ability to directly access law enforcement records systems while performing pedestrian and vehicle investigations.

Further, while Amtrak has submitted security plans to the government for review and currently has been included in recent rail security funding legislation, S. 2273 which was reported out of the Senate Commerce Committee today with bipartisan support, the lack of a consistent and ongoing source for security related funding issues will remain in the future, even if its immediate and critical needs are addressed through the current legislation. I would also request consideration of specific legislation in this area.

Thank you for this opportunity to provide testimony to the Committee.

Statement of Senator Orrin G. Hatch
Before the United States Senate Judiciary Committee
Hearing on "Keeping America's Mass Transportation System Safe:
Are the Laws Adequate?"
April 8, 2004

Good afternoon. I want to thank the witnesses for taking time out of their busy schedules to testify before us today. As I am sure you all are aware, the coordinated bombing of three rail stations in Madrid, Spain on March 11, 2004 killed 191 people and injured almost 1,500 others. It is believed that a multinational cell of Al Qaeda loyalists are responsible for this attack as they threatened to turn Madrid into an inferno if Spain did not withdraw its support in Iraq and Afghanistan. This tragic incident was reminiscent of the cowardly act of terrorists on our homeland and renewed in all of us, a sense of fear and foreboding that similar acts could occur on our soil.

We are not the only ones who feel this way. Just last week, police in London arrested eight men and seized more than half a ton of potential explosives from a self-storage container less than five miles from Heathrow Airport. These recent European incidents raise yet again the question of whether we are doing all we can to prevent criminals from terrorizing the American public.

As we recognize from our daily commutes, buses, railroads and subways present unique challenges because they are often located in areas that are densely populated. They are designed for convenience to the traveler of both short and long journeys. The rail and bus stations are open in nature and these journeys often entail frequent stops after short periods of time, making it easier for terrorists to evade detection. Two days ago, Union Station was evacuated and train service on AMTRAK and Metro lines were briefly suspended while police examined a suspicious backpack which contained lighter fluid in the station's main hall. This threat is not going away.

The war on terrorism is an ongoing one. Although we passed legislation last year creating a new crime for mass transportation systems in 18 U.S.C. § 1993, it behooves all of us to make sure that our criminal laws are up to date—that they are amended as necessary to keep up with new technologies and new methods of spreading terror. We must also ensure that any loopholes or inappropriate inconsistencies be eliminated. To that end, I am an original co-sponsor of S. 1608, "Anti-Terrorism Protection of Mass Transportation and Railroad Carriers Act of 2003," which would replace 18 U.S.C. §§ 1992 and 1993 and create a new section 18 U.S.C. § 1992 outlining criminal prohibitions against terrorist attacks and other acts of violence against mass transportation systems on land, on water, or through the air, and against railroad carriers. I look forward to hearing from our witnesses about whether further legislation is necessary in this area to protect our rail systems.

TESTIMONY

Terrorism and the Security of Public Surface Transportation

BRIAN MICHAEL JENKINS

CT-226

April 2004

Testimony presented to the Senate Committee on Judiciary on April 8, 2004

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Statement of Brian Michael Jenkins¹**Before the Committee on Judiciary
United States Senate****April 8, 2004**

After every major terrorist attack in any part of the world, security officials and the American public alike turn to the question of what can be done to deter or prevent a similar attack from occurring here. Unfortunately, it often requires a major disaster to arouse concern sufficiently to mobilize the political will to take needed action. Useful things are often accomplished in the shadow of tragedy.

It is not because those charged with security are unable to imagine what terrorists might do. It is rather that people seldom support costly and potentially disruptive measures to protect them against things that haven't occurred. The reality is that because terrorists can attack anything, anywhere, any time, while we cannot protect everything, everywhere, all the time, security, tends to be reactive. Certainly we must try to protect targets that terrorists show a proclivity to attack.

A NEW PRIORITY TARGET FOR TERRORISM

Terrorist attacks on public transportation are nothing new. Since the early 1990s, those concerned with the security of public surface transportation have been increasingly worried that trains and buses were becoming highly attractive targets for terrorists bent upon body counts.

¹ The opinions and conclusions expressed in this testimony are the author's alone and should not be interpreted as representing those of RAND or any of the sponsors of its research. This product is part of the RAND Corporation testimony series. RAND testimonies record testimony presented by RAND associates to federal, state, or local legislative committees; government-appointed commissions and panels; and private review and oversight bodies. The RAND Corporation is a nonprofit research organization providing objective analysis and effective solutions that address the challenges facing the public and private sectors around the world. RAND's publications do not necessarily reflect the opinions of its research clients and sponsors.

Only the month before the Madrid bombings, a terrorist bomb killed 39 people and injured more than 100 on Moscow's Metro. In 2001, authorities in Singapore discovered a terrorist plot to bomb various sites, including the city's subways; and we know now that jihadists in Europe planned to detonate a bomb at Milan's central rail station.

In recent years, terrorists linked with global jihad killed nine people and injured 60 on Manila's Metro and threatened to release toxic gas in Moscow's subways, inspired no doubt by the 1995 sarin attack on Tokyo's subways that left 12 dead and over 5,000 seriously ill. Islamic extremists launched a bombing campaign on the commuter trains of Paris, and since 2000, suicide bombers have killed scores of people on Israeli buses.

For those determined to kill in quantity and willing to kill indiscriminately, trains, subways and buses are ideal targets. They offer terrorists easy access and escape. Congregations of strangers guarantee anonymity.

Crowds in contained environments are especially vulnerable to both conventional explosives and unconventional weapons. Terrorist attacks on public transportation systems also cause great disruption and alarm – the traditional goals of terrorism.

The terrorists who target transportation systems are often seeking slaughter. An analysis of nearly 1,000 terrorist attacks on transportation found that the percentage of those involving fatalities – 37 percent – was much higher than the percentage for terrorist attacks in general. Two-thirds of the surface transportation attacks clearly were intended to kill; 74 percent of the fatal attacks involved multiple fatalities; and 28 percent involved 10 or more fatalities.¹

Could such an attack happen here? Of course it could, and it nearly did in 1997, when Islamic extremists planned to carry out suicide bombings on New York City's subways. A lucky tip enabled police to foil the plot.

AN AVIATION SECURITY MODEL INAPPROPRIATE

Surface transportation cannot be protected in the same way commercial aviation is protected. Nearly 60,000 screeners are needed to check the 2 million passengers who fly from U.S. airports daily. An equivalent nationwide screening system for the approximately 26 million passengers traveling on trains, subways, and buses on an average day would require hundreds of thousands of screeners and would cost tens of billions of dollars.

Trains, subways, and buses must remain readily accessible, convenient, and inexpensive. The deployment of metal detectors, X-ray machines, explosive sniffers, and armed guards, which have become features of the landscape at airports, cannot be transferred easily to subway stations or bus stops. The delays would be enormous and the costs prohibitive – public transportation would effectively be shut down.

The alternative – making commuters use private vehicles – is impractical, would increase gridlock, and would raise the nation's death toll from traffic accidents.

Moreover, any new set of security measures should provide a net security benefit; it should not merely displace the risk toward other equally vulnerable targets. For example, it would make little sense to protect only buildings on the north side of the street when terrorists could just as easily set off bombs on the south side. Keeping terrorists off airliners provides a net security benefit. As terrorists demonstrated on 9-11, a hijacked airliner can be turned into a missile that kills thousands. Security measures to protect airport lobbies, however, provide fewer net benefits. The same situation applies to trains and buses.

Transportation facilities are public places. Other public places that offer terrorists similar body counts--shopping malls, crowded streets, or the lines of people waiting to get through security measures--are just as vulnerable. Erecting a protected perimeter around

every public place, from department stores to bus depots, from subways to supermarkets, is not only impractical, it destroys an open society.

And since the nature of the threat means that whatever steps we take now are likely to become permanent – can anyone imagine a systematic reduction in airline security – we must ensure that new security measures are not only effective, but are also sustainable and efficient.

WHAT CAN BE DONE?

This does not mean that nothing can be done to increase surface transportation security. Security officials in countries that have been subjected to terrorist attacks have developed some effective countermeasures. Good security can make terrorist attacks more difficult, can increase their likelihood of being detected, can minimize casualties and disruption, can reduce panic, and can reassure passengers.

Analyses of previous terrorist attacks and campaigns against mass transit systems have provided a growing catalog of lessons learned and best security practices. These include measures intended to deter or prevent attacks, assist in detection and diagnosis, and mitigate casualties and disruption through design and preparedness.ⁱⁱ

Visible security patrols and staff have a deterrent effect. Closed-circuit television coverage has been used extensively in Europe with good results. And enlisting employees and the public in surveillance can also be very effective.

The public, however, cannot be expected to assist unless communications are facilitated and calls bring a rapid, visible response. That requires emergency phone boxes, good security camera coverage, and patrolling officers near the scene.

Detection and diagnosis are essential to both keeping passengers out of harm's way and minimizing needless disruption. New technology is giving us the ability to detect and

diagnose more effectively. Chemical, biological, and radiological detection equipment has been deployed on an experimental basis on some subway systems. But again, detection must be coupled with rapid-response procedures.

Much can be done through the design of vehicles and facilities to eliminate hiding places, facilitate surveillance, and reduce casualties by removing materials that explosions may turn into shrapnel or that burn with toxic fumes. Adequate ventilation to remove deadly smoke, a leading killer in tunnels, must be ensured.

Safe areas can be created to protect passengers during bomb threats when evacuation is not feasible. Facilities should be designed to make emergency response as rapid and effective as possible.

Exercises and drills involving transportation staff, police, and other emergency responders are crucial. This was demonstrated dramatically on September 11, when the 60,000 passengers and 300 employees below the World Trade Center were all safely evacuated.ⁱⁱⁱ

A "BEST PRACTICES" APPROACH

While there are many good ideas, there is no single best way to implement them. The nature of commercial aviation obliges us to treat security in the same way at all 430 commercial airports. But surface transportation is not a single national system. It is a complex quilt of networks that vary in size, mode, and means of providing security. A "best practices" approach may be the most effective model for surface transportation security, because it allows local authorities and operators to learn from one another's best practices and to decide what works best for them.

In a "best practices" approach, the federal government supports research and development, subsidizes the deployment of experimental technology, provides intelligence, augments security with additional resources and specialized equipment when

the threat warrants, and assists with emergency response and investigation in the event of a terrorist attack.

The legislation offered by Senator Sessions (Attacks Against Mass Transportation Systems and Railroad Carriers) and the proposal of Senators Biden, Specter, and Hatch (Reducing Crime and Terrorism at America's Seaports) expand the area of criminal law and facilitate intelligence collection and investigations.

Local authorities assist with intelligence, security, crisis planning, and immediate response. Transportation operators, either public commissions or private companies, have the front-line responsibility for implementing security measures, responding to threats, crisis planning, and restoring operations.

Years ago, I was asked by a member of Congress whether, if I were given all the resources I wanted and all the authority I needed, I could guarantee that no airplane would ever again be hijacked or sabotaged. "That's easy," I answered, "I could ground all the planes." But as long as we must fill thousands of airplanes with millions of passengers and fly them around the country every day at an affordable price, we must accept some risks.

That is even more applicable in the case of public surface transportation. We can and should improve security, but in effective and practical ways that also protect the vital function of these lifelines.

A NATIONAL TRANSPORTATION SECURITY STRATEGY

Since the beginning of the republic, security considerations have been major factors in the development of the nation's transportation system, from the building of the first national road to the construction of railroads to the digging of the Panama Canal to the creation of the interstate highway system. Under current circumstance, we need to think again about a national transportation security strategy.^{iv}

This involves more than expanding laws and mandating increased security. It makes security a criterion in the design of new transportation facilities. It may encourage the construction of new transportation infrastructure that is inherently more robust, or that reduces current vulnerabilities, or that has built-in redundancies to reduce disruption. It may be determined that one mode of transportation offers net security benefits over another. Is the nation safer with high-speed rail or with more commuter flights?

The transfer of the Transportation Security Agency from the Department of Transportation to the Department of Homeland Security, while practical from the standpoint of consolidating security functions, separates transportation security from the broader considerations of transportation strategy. It should not lead to an exclusive reliance on regulation and enforcement as the only ways to mitigate risk, nor should it be allowed to discourage creative approaches.

This brings me to a final observation. We must do all we can to enhance the ability of our intelligence efforts and law enforcement officials to uncover and thwart terrorist plots, increase security around vulnerable targets, and improve our ability to respond to attacks when they occur.

At the same time, we must be realistic about the acceptance of risk. We cannot allow fear to become the framework of American governance. We should be wary of slouching toward a "security state" in which protected perimeters, gates, and guards dominate the landscape and irrevocably alter everyday life. Even this august body cannot legislate an end to terrorism; it cannot eliminate all vulnerabilities from an open society or transfer all risks from its citizens to its government, nor should it try.

Ultimately, the strength of this nation depends not on the thickness of its concrete walls or the severity of its criminal code, but upon the courage, self-reliance, and inherent creativity of its free citizens.

ⁱ Brian Michael Jenkins and Larry N. Gersten, "Protecting Public Surface Transportation Against Terrorism and Serious Crime: Continuing Research on Best Security Practices," Mineta Transportation Institute, September 2001.

ⁱⁱ Brian Michael Jenkins, "Protecting Public Surface Transportation Against Terrorism and Serious Crime: An Executive Overview," Mineta Transportation Institute, October 2001.

ⁱⁱⁱ Brian Michael Jenkins and Frances Edwards-Winslow, "Saving City Lifelines: Lessons Learned in the 9-11 Terrorist Attacks," Mineta Transportation Institute, September 2003.

^{iv} Brian Michael Jenkins, "Improving Public Surface Transportation Security: What Do We Do Now?" The Lexington Institute, July 2003.



**Statement of Senator Patrick Leahy,
Ranking Democratic Member, Senate Judiciary Committee
Hearing On "Keeping America's Mass Transportation System Safe:
Are the Laws Adequate?"
April 8, 2004**

I thank Senator Biden and Senator Sessions for holding this hearing today and Chairman Hatch for scheduling it. Last month, terrorists nonchalantly placed 10 explosive-filled backpacks on a crowded city train and then walked away, leaving a trail of carnage behind them. The plan was simple but effective. Nearly 200 people died, more than 1,400 were injured. Though this horrific scene took place in Madrid, we all know that it could have occurred in any major city in the United States. My sympathies are with the Spanish people and the families of the victims of this crime.

It has been reported that the Federal Government is spending \$4.5 billion on aviation security this year, but only \$65 million on rail security, even though five times as many people take trains as planes every day. The catastrophic Madrid bombings demonstrate all too cruelly that this fiscal reality is replete with risks. It seems that train security is the forgotten caboose in national efforts to develop a transportation system that is safe from terrorist attack. Department of Homeland Security Undersecretary Asa Hutchinson told CNN last month that "we very well [may] need to . . . invest more" in the mass transit security system. I say that this could "very well" be the understatement of the year.

The nation's rail transportation system includes over 100,000 miles of rail and 500 train stations. Each year more than 500 million people, 2.5 million railcars, and 5.7 million cargo containers must be processed at our borders. The security challenges are significant. They include the rail system's intentionally-accessible structure, tight budgets and financial woes, and the sheer number and overlapping responsibilities of myriad federal agencies, State and local governments, and private businesses involved in transportation security. Considering that transportation systems are the object of roughly one-third of terrorist attacks worldwide, we cannot neglect the safety of rail transportation without taking tremendous risks.

The attacks of September 11, 2001, demonstrated our air transportation system's vulnerability to the threat of terrorism. We have made efforts to improve security in our airports and safety in our skies. Planes are not the only the public carriers in the United States and, to be sure, planes are not the only possible targets for terrorist attack. This is one reason that I was successful in including in passage of the PATRIOT Act a crime prohibiting terrorist attacks and other acts of violence against mass transportation systems. I also successfully pushed last year for clarification of the word "vehicle" in Title 18, United States Code Section 1993 to ensure that vehicle includes "any carriage or other contrivance used, or capable of being used, as a means of transportation on land, water or through the air."

Many transportation operators have conducted risk or security assessments, undertaken emergency drills, and developed security plans—Amtrak and Greyhound among them. State and local governments have also acted to improve the security of the transportation system. Such entities play a critical role because they often own a large portion of the local transportation system and because their police, fire, and emergency medical teams serve as first responders to incidents involving transportation assets. There are a number of pending bills by Senators Hollings, Schumer, Feinstein and others, including S.22, the Justice Enhancement and Domestic Security Act introduced in January 2003, to address rail security and funding issues that should be getting more attention in the United States Senate but that Senator Sessions unfortunately chose not to make the subject of this particular hearing. Senator Biden has championed a strong port security measure.

Just over seven months ago, the General Accounting Office reported on concerns expressed by a number of representatives from transportation industry and State and local government associations. These groups told GAO that they are not included in governmental decision-making processes, such as the development of security standards for mass transportation. They explained that clarifying federal roles and coordinating federal efforts is critical because, as of that time, their members had not been informed which agency they should contact regarding security concerns or for oversight purposes. Some representatives from the transportation industry and State and local government associations also noted that they have received conflicting messages from the different federal entities.

It is very troubling that a real or perceived lack of information sharing and interagency cooperation within the Federal Government could remain an issue two years after September 11. Have we not learned the importance of coordination, communication, and consensus-building? Federal programs like the Surface Transportation Information Sharing and Analysis Center have mandates for coordination between government and private industry on information sharing and threat assessment, but small transit operators and railroads cannot afford to participate. What is wrong with this picture?

Senator Hollings introduced a bill, S.1961, last fall to allot \$515 million for risk assessments and security improvements for trains. In fact, he has introduced the bill twice before, but it has gone nowhere. I count myself in good company among his 15 bipartisan co-sponsors. Last year, a survey of transit agencies by the American Public Transportation Association identified some \$6 billion in unmet security needs. These needs remain unmet today, and yet we have not received a plan from the Transportation Security Administration to address them.

We must be mindful that rapidly rising operating costs -- including fuel, liability insurance, workers compensation insurance, and employee health insurance -- have already strained tight budgets for many public transit providers. Thus, additional security measures may well require additional federal funding. As legislative and regulatory proposals on security are considered, we must seek to ensure that the ideas proposed are practical, feasible and cost-effective, particularly when implemented in small or rural environments like Vermont. In addition, all security initiatives should reflect the views of

first-responders, upon whom we rely to provide meaningful support to public transit's safety and security programs.

The distinguished panel at today's hearing comes to us with years of practical experience and critical insight. I thank them for making themselves available on short notice to participate in this discussion. I also want to thank Senator Biden for serving as Ranking Member and for his leadership in this area. As I have noted, he has important legislation pending, S.1587, that includes cargo safety initiatives. This is an issue that Vermont's U.S. Attorney Peter Hall raised before the Senate Committee on Governmental Affairs last summer when he touted the important work that is being done in Vermont through Operation Safe Commerce, a program designed to prevent the use of the global cargo container delivery system to attack the United States.

There is much to be done to keep America's transportation systems, including its railways, safe. Today's hearing should provide fruitful suggestions. With our combined efforts, surely we can make mass transit more secure for the American public and the businesses that use and rely upon it.

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Testimony of S. Mark Lindsey
Chief Counsel, Federal Railroad Administration
U.S. Department of Transportation
before the Committee on the Judiciary
United States Senate
April 8, 2004

Mr. Chairman, members of the Committee, I am very pleased to be here today to testify on behalf of the Secretary of Transportation concerning the need for stronger Federal criminal laws, to deter terrorist attacks and other violence against railroad carriers and mass transportation systems. This hearing is especially timely in light of the March 11 attacks on four commuter trains in Madrid, the subsequent discoveries of bombs under railroad tracks in both Spain and France, and the intelligence reports that terrorists might try to bomb rail lines and buses in major U.S. cities this summer.

Passenger railroads and mass transportation systems pose attractive targets for terrorist attacks because of the large concentration of people, the difficulty of securing such open and extensive systems, and the fact that such attacks can be highly disruptive to the economy. While freight railroads carry only a small number of people as crew, they are likewise attractive targets for terrorists because they also operate over open and extensive systems and because they carry hazardous materials. The U.S. Department of Transportation (DOT), the U.S. Department of Homeland Security (DHS), and other Federal agencies have been working with the railroad and transit industries, sharing knowledge, expertise, ideas, and resources to mitigate the terrorist threat to our Nation's railroads and mass transportation systems. The security efforts of the

various Federal and private parties were detailed in testimony given to the Senate Committee on Commerce, Science, and Transportation on March 23, 2004.

While FRA and other Federal agencies will continue our efforts to safeguard our railroads and mass transportation systems, the enactment of stronger Federal criminal laws is also necessary. The enactment of legislation along the lines of S. 2289 (introduced by Senator Sessions) should help deter attacks against these systems and ensure that any acts that do occur are appropriately punished. DOT strongly supports S. 2289 and appreciates the Committee's commitment to help deter acts of violence against transportation systems.

S. 2289 would consolidate the existing "wrecking trains" statute at 18 U.S.C. 1992 and the mass transportation anti-terrorism statute at 18 U.S.C. 1993 into a new and more comprehensive section 1992. FRA and the Federal Transit Administration have worked very closely with the Department of Justice (DOJ) since 1997 in trying to secure the passage of similar legislation. DOT submitted anti-terrorism bills in 1997, 1999, and 2002, each of which contained many of the central provisions of S. 2289. DOT's legislative proposals formed the basis for the mass transportation statute, which was first enacted as part of the USA PATRIOT Act in 2001.

There are eight gaps or ambiguities in the wrecking trains and mass transportation statutes that S. 2289 would address.

First, the bill would update and slightly expand the wrecking trains statute's language regarding acts of violence against railroad carriers. The wrecking trains statute was enacted in 1940 and contains terminology that is not as expansive as that used in modern Federal criminal statutes. The bill would update the language used in referring to acts targeted at railroads (e.g.,

replacing the term “explosive substance” with “biological agent or toxin, destructive substance, or destructive device”). And more types of railroad property and equipment would be explicitly protected (guideways, locomotive tenders, and on-track equipment). The definitions of the mass transportation statute would be slightly modified to reflect the addition of railroads, and terrorist acts involving hazardous materials including radioactive materials and spent nuclear fuel.

Second, the bill would extend to railroads the protections that apply to mass transportation systems under the mass transportation statute. The mass transportation statute contains a much more comprehensive listing of prohibited conduct than does the wrecking trains statute. The mass transportation prohibitions cover mass transportation by air, marine, and surface transportation. While these statutory prohibitions clearly apply to attacks against commuter railroads, and arguably apply to Amtrak and tourist railroad operations as well, the massive freight railroad operations of this country are not covered. The vulnerabilities of freight shipments--whether spent nuclear fuel or other hazardous materials—need to be addressed to better protect the general public.

In particular, the following six additional acts of terrorism from the mass transportation statute would be made applicable to railroads explicitly:

- (1) placing a biological agent or toxin on or near railroad equipment;
- (2) placing a biological agent or toxin on railroad infrastructure with intent to, or knowing or having reason to know such activity would likely derail, disable, or wreck railroad on-track equipment [The bill would also cover placement of these substances “near” railroad and mass transportation property, a provision which is not currently in the mass transportation statute.];

- (3) damaging a centralized dispatching facility;
- (4) interfering with, disabling, or incapacitating any person engaged in dispatching, operating, or maintaining railroad on-track equipment;
- (5) using a dangerous weapon, with the intent to cause death or serious bodily injury to an employee or passenger of a railroad carrier any other person while any of the foregoing is on the property of a railroad carrier "that is used for railroad purposes" [The highlighted qualifying language would also be made applicable to similar acts committed on the property of mass transportation systems; this qualifier is not currently in the mass transportation statute.]; and
- (6) conveying or causing to be conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to engage in any of the prohibited acts.

Third, the bill would lower the evidentiary threshold for Federal prosecution of acts against railroads to the same threshold as in the mass transportation statute. The wrecking trains statute prohibits specified acts against railroad equipment and property that is engaged in interstate or foreign commerce. The mass transportation statute is much broader in scope and applies not only to acts committed on, against, or affecting a mass transportation provider engaged in or affecting interstate or foreign commerce, but also to a person who travels, communicates, or transports materials across a State line in aid of the commission of the offense. With this expanded scope, attacks against railroad carriers will be easier to prosecute.

The bill also substitutes the word "knowingly" for the term "willfully," which is the *mens rea* the defendant must have in committing the prohibited conduct under the wrecking trains

statute and the anti-terrorism mass transportation statute. We believe that the use of “knowingly” merely clarifies existing law since the courts have equated the term “willfully” in the wrecking trains statute with the term “knowingly.” Courts construing the wrecking trains statute have held that it is not necessary to show that the defendant had a specific intent to wreck a train but merely that the defendant was aware of his acts and did not act because of ignorance, mistake, or accident, and that the defendant’s conduct could substantially interfere with the interstate railroad system.

Fourth, the bill would extend to mass transportation systems a provision in the existing wrecking trains statute that makes it a crime to undermine or make the use of the mass transportation infrastructure hazardous or unworkable. In addition, the bill would add “track” and “electromagnetic guideways” to the list of types of mass transportation infrastructure protected.

Fifth, the bill would make it a crime to cause the release of a hazardous material or a biological agent or toxin on or near the property of a railroad or mass transportation provider with the intent to endanger the safety of any person or with a reckless disregard for the safety of human life. This is a new prohibition that does not exist in current law. Freight trains haul a tremendous amount of hazardous materials—nearly a million rail tank cars and 238,000 intermodal loads of hazardous materials annually, and lesser amounts are hauled by mass transportation providers. In calendar year 2002, trains provided over a billion ton-miles of hazardous materials transportation. Rail is the predominant method of transportation for certain classes of hazardous materials that pose an especially high risk, including explosives, radioactive

materials, and flammable solids. It is essential that the Federal criminal statutes deter terrorists from using these hazardous materials and biological agents and toxins to harm the public.

Sixth, the bill would clarify that it is not a violation of the statute to transport on railroad or mass transportation equipment or property hazardous materials in commerce that are in accordance with Federal hazardous materials transportation law and DOT's implementing regulations, or, if in violation of these provisions, the violation is merely a civil violation and not a criminal violation.

Seventh, the bill would close a gap in the "mass transportation" statute noted in the "Shoe Bomber" case, where the district court observed that the literal language of the statute prohibited an attempted act of terrorism but did not explicitly penalize such an attempt. The district court correctly rejected as meritless Mr. Reid's argument that Congress had not made attempt crimes under the mass transportation statute punishable. The bill would also update the definition of "dangerous weapon" in the mass transportation statute to cover box cutters and other previously unrecognized weapons.

Eighth, the bill would toughen or clarify the penalties for certain violations. For violations not falling in the "aggravated offense" category, the penalty would be a fine or imprisonment of not more than 20 years, or both. The bill would make it an "aggravated offense" to commit prohibited acts against a train or a mass transportation vehicle that carries a passenger or employee, radioactive waste, spent nuclear fuel, or designated hazardous materials. The general penalty for aggravated offenses would be a fine, or imprisonment for any term of years or life, or both. A term of not less than 30 years would apply to an offense involving high-level radioactive waste or spent nuclear fuel. A sentence of either life imprisonment or capital

punishment would apply where the offense has resulted in the death of another person. Currently, the maximum penalty under the mass transportation statute is life imprisonment. The death penalty is already available for a violation of the "wrecking trains" statute that results in a death. The bill would correct this anomaly by making available the death penalty for attacks against mass transportation systems that result in a death of a person. Recently, a Federal district court ruled that the wrecking trains statute does not impose a mandatory minimum sentence of life imprisonment or death against an individual who willfully derailed a freight train killing the conductor and seriously injuring the locomotive engineer. The bill would make clear that if a violation of the statute results in a death, that the court's choice would be to impose a sentence either of life imprisonment or the death penalty.

Conclusion

Federal agencies, working in cooperation with the railroads and mass transportation systems, have been working hard to prevent terrorist attacks against our Nation's railroads and mass transportation systems. With the rest of the senior leadership team at DOT, FRA is committed to this effort to improve transportation security by the relentless pursuit of this goal by Transportation Secretary Norman Mineta. His actions on September 11 to protect the flying public, his stewardship of the creation of the Transportation Security Administration (TSA), his leadership in making the transition of the TSA and Coast Guard to the DHS, all are accomplishments which provide us all at DOT a high standard by which to gauge our own efforts.

The Department appreciates the Committee's continued efforts to deter terrorist activity and protect the Nation's railroads and mass transportation systems. We are ready to work with

you on improving the Federal criminal statutes in order to bring about an even safer and more secure rail transportation system. Thank you for the opportunity to appear before your Committee, and I welcome the chance to respond to your questions.



Department of Justice

STATEMENT

OF

HARRY S. MATTICE, JR.
UNITED STATES ATTORNEY
EASTERN DISTRICT OF TENNESSEE

BEFORE THE

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

CONCERNING

KEEPING AMERICA'S TRANSPORTATION SAFE:
ARE THE LAWS ADEQUATE?

PRESENTED ON

APRIL 8, 2004

**STATEMENT OF
HARRY S. MATTICE, JR.
UNITED STATES ATTORNEY
EASTERN DISTRICT OF TENNESSEE**

BEFORE THE

**UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY**

APRIL 8, 2004

Good afternoon, Mr. Chairman and distinguished members of the Committee. Thank you for the opportunity to join you today to discuss the adequacy of the laws protecting America's mass transportation and railroad systems.

In the wake of the Madrid rail bombings and the subsequent discovery of unexploded bombs underneath railway lines in France and Spain, this hearing addresses a timely and important issue. Mass transportation and railroad systems play a vital role in the life of our nation. Americans regularly use trains, buses, airplanes, and other mass transportation vehicles to commute to work, visit loved ones, and go on vacations. Railroads are also used to transport vital goods and materials across the country. The availability of safe and reliable mass transportation and railroad systems is critical to the health of our nation's economy as well as Americans' quality of life, so we must remain vigilant and prepare for the possibility that terrorists may attempt to launch attacks on those systems.

The protection of mass transportation and railroad systems obviously requires a multifaceted approach. In my testimony today, however, I would like to focus on one critical element of any strategy for safeguarding our nation's railways, buses, subways, ferries, and passenger aircraft: the existence of strong, consistent, and effective criminal

sanctions under federal law for those perpetrating attacks on mass transportation and railroad systems

In 2001, Congress took an important step towards protecting mass transportation systems when it passed the USA PATRIOT Act. Section 801 of the Act created a new federal statute, 18 U.S.C. § 1993, which criminalizes terrorist attacks and other acts of violence against mass transportation systems. That statute, to give a few examples, makes it a federal crime to willfully: (1) wreck, derail, set fire to, or disable a mass transportation vehicle; (2) place a biological agent or destructive device on or near a mass transportation vehicle with the intent to endanger the safety of any passenger or employee of a mass transportation provider or with a reckless disregard for the safety of human life; or (3) use a dangerous weapon with the intent to cause death or serious bodily injury to an employee or passenger of a mass transportation provider while on the property of a mass transportation provider.

As the U.S. Attorney for the Eastern District of Tennessee, I have witnessed firsthand the value of this new statutory provision. Recently, a passenger on a Greyhound bus traveling from Nashville, Tennessee to Knoxville allegedly caused disturbances on the bus and then attempted to assault the bus driver with a knife. Thankfully, other passengers were able to subdue this individual before he was able to reach the driver. But the driver, other passengers, and even members of the general public were put at significant risk by this passenger's alleged conduct.

After reviewing the available options, prosecutors in my office determined that the best avenue for prosecuting this violent passenger effectively was to charge him under the new federal statute prohibiting terrorist attacks and other attacks of violence

against mass transportation systems contained in section 801 of the USA PATRIOT Act. The passenger was subsequently indicted for violating 18 U.S.C. § 1993, and a jury trial has been scheduled for June 8, 2004.

The Department also attempted to use the new mass transportation statute in the case of Richard Reid, the individual charged with attempting to blow up American Airlines Flight 63 with bombs concealed in his shoes. A federal grand jury in Massachusetts indicted Reid on a variety of federal charges, including violating 18 U.S.C. § 1993. Unfortunately, however, a federal district court in Massachusetts dismissed this charge against Reid, finding that he could not be charged with attempting to wreck a "mass transportation vehicle" because an airplane was not a "vehicle" as that term was used in the statute. Following this decision, Congress acted swiftly to correct this problem. Last year, in section 609 of the PROTECT Act, Congress amended the mass transportation statute to broaden the definition of "vehicle" to include "any carriage or contrivance used, or capable of being used, as a means of transportation on land, water, or through the air," which clearly includes passenger aircraft. The Department of Justice thanks Congress for moving quickly to close this loophole and to ensure that passengers using all types of mass transportation vehicles are protected by 18 U.S.C. § 1993.

As you can see, Congress and the Administration have taken significant steps towards ensuring that those who attack mass transportation and railroad systems are effectively prosecuted and appropriately punished. But there is still more to be done to close gaps in these statutes and make them clearer and less vulnerable to legal challenge. This is why the Department of Justice strongly supports S. 2289, the Railroad Carriers

and Mass Transportation Protection Act of 2004, recently introduced by Senator Sessions. This same legislation has also been introduced in the House of Representatives by Congresswoman Capito.

S. 2289 would make a number of significant improvements to the federal criminal laws protecting mass transportation systems and railroad systems. I will highlight a few of the most important changes. To begin with, S. 2289 would consolidate the new mass transportation statute, 18 U.S.C. § 1993, and the statute imposing criminal sanctions on “wrecking trains”, 18 U.S.C. § 1992, into a new criminal prohibition against attacks on “mass transportation systems on land, on water, or through the air, and against railroad carriers.”

This consolidation would harmonize the laws protecting mass transportation systems, including passenger trains, and the laws protecting railroads, including freight trains. Under existing law, for example, the wrecking trains statute does not prohibit many types of attacks that are currently covered by the mass transportation statute, such as interfering with, disabling, or incapacitating a dispatcher or driver. S. 2289 would eliminate these inconsistencies.

Conversely, the wrecking trains statute currently prohibits one type of attack that the mass transportation statute does not address. The wrecking trains statute makes it a federal crime to undermine or make unworkable, unusable or hazardous to work on or use railroad infrastructure, such as terminals, but the mass transportation statute contains no comparable provision. S. 2289 would extend this protection to mass transportation systems. Thus, S. 2289 will ensure that railroad carriers and mass transportation providers receive the same protection under federal criminal law.

In addition, the current wrecking trains statute lacks some of the provisions in the mass transportation statute that facilitate successful federal prosecutions. The mass transportation statute, for example, applies where a person “in the course of committing [a prohibited act] . . . travels or communicates across a State line in order to commit such act, or transports materials across a State line in aid of the commission of such act.” The wrecking trains statute, however, does not contain these jurisdictional provisions, which makes it more difficult for federal prosecutors to bring charges for certain attacks on non-passenger trains. S. 2289 would correct this problem by making the same jurisdictional provisions applicable both to attacks against railroad systems and against mass transportation systems.

S. 2289 also would eliminate the inconsistency between the mens rea standard in the mass transportation statute and the mens rea standard in the wrecking trains statute. While the mass transportation statute currently requires that an individual willfully commit one of the acts prohibited by that statute, the wrecking trains statute requires that an individual committing some of the acts prohibited by that statute specifically intend to derail, disable, or wreck a train. This heightened intent standard is not justified and may hamper our ability to prosecute those attacking railroad systems in certain cases. S. 2289 would fix this problem by requiring that the actor “knowingly” commit the prohibited acts, and with respect to certain acts involving railroad or mass transportation infrastructure (subsection (a)(3) of the new statute), require that actor commit those acts with intent to, or knowing or having reason to know such activity would likely derail, disable, or wreck railroad on-track equipment or a mass transportation vehicle.

In addition to providing consistency, S. 2289 would strengthen the protection of mass transportation and railroad systems by updating the law to match current developments and by making the statutory language more precise in several respects. For example, the bill would expand the types of railroad property and equipment that are explicitly protected by federal law to include electromagnetic guideways, locomotive tenders, and on-track equipment. It also would broaden the statute's coverage by updating the definition of "dangerous weapons" to cover box cutters and other previously unrecognized weapons. Likewise, the bill would expand the types of prohibited attacks to include causing the release of a hazardous material or a biological agent or toxin on or near the property of a railroad carrier or mass transportation provider, with the intent to endanger the safety of any person or with a reckless disregard for the safety of human life.

S. 2289 would also ensure that terrorists who attack mass transportation systems are punished with the appropriate severity. Currently, for instance, while those violating the wrecking trains statute are eligible for the death penalty if their offense results in death, those violating the mass transportation statute are not eligible for the death penalty. S. 2289 would end this senseless discrepancy. It would increase penalties for the most serious attacks against mass transportation systems by making it an "aggravated offense" to commit the prohibited terrorist acts in situations involving vehicles carrying passengers, high-level radioactive waste, spent nuclear fuel, or a designated hazardous material. The penalty for these attacks could include a fine, imprisonment for up to life, or both. An attack on a vehicle transporting nuclear material would be subject to a 30-

year minimum penalty. For an offense resulting in the death of any person, the defendant would receive either capital punishment or life imprisonment.

Finally, the bill would add the word “attempt” to the penalties provision of the mass transportation statute—it already appears in the provision describing the criminal offense—to avoid an issue that arose in the recent prosecution of Richard Reid. Reid raised the omission of the attempt language in the penalties provision as a technical defense to the charge against him, contending that Congress did not intend to make attempt crimes punishable. The court correctly rejected Reid’s interpretation as meritless. Adding “attempt” to the penalties provision, however, would eliminate any future uncertainty as to Congress’s intent and avoid any future litigation on this point.

In conclusion, the Department of Justice believes that the S. 2289, the Railroad Carriers and Mass Transportation Protection Act of 2004, would greatly assist in prosecuting those who perpetrate terrorist attacks upon this nation’s mass transportation and railroad systems. By eliminating inconsistencies in current law, expanding the scope of legal protection provided to mass transportation and railroad systems, and increasing penalties for those who attack those systems, S. 2289 would improve the security of our nation’s mass transportation and railroad systems.

The Department would be happy to work the Congress in the weeks and months to come on legislation to protect our nation’s mass transportation and railroad systems. Thank you once again for allowing me to appear before you today to discuss this very important issue.

STATEMENT OF SENATOR JEFF SESSIONS**Keeping America's Mass Transportation System Safe:
Are The Laws Adequate
April 8, 2004**

On March 11 of this year, the pursuit for democracy was once again threatened, when nine- hundred-eleven days after the attacks on the World Trade Center in this country terrorists struck again in Madrid. While that attack might not have resulted in as many deaths as the United States experienced on September 11th, it is nonetheless troubling and telling that the war on terrorism is not ending, but just beginning.

While there are questions that remain unanswered about infrastructure and vulnerabilities, today we assess whether the current criminal laws are adequate to respond to a terrorist attack on America's mass transit systems. I believe that this hearing will reveal that the disturbing answer to that question is no.

Everyday, millions of Americans turn to mass transit for pleasure and business. To be exact, 32 million times a day people board public transportation systems. When people board the subway to commute to work or take an Amtrak train to visit their family in another state, they should do so with the comfort of knowing our laws are fully adequate to deter and punish anyone who would attack them.

The attacks of September 11 provided us notice that our laws were inadequate to combat terrorism. The Congress responded to that notice in a bipartisan manner and passed, with overwhelming support, the Patriot Act. With the Patriot Act, Congress acted in response to a devastating terrorist attack. However, this time we have an opportunity to be ahead of the terrorists by providing law enforcement the tools necessary to combat those who wish to destroy this country's spirit.

On Tuesday of this week, I introduced S. 2289, The Railroad Carriers and Mass Transportation Act of 2004. This bill is very similar to S. 1608, the Anti-Terrorism Protection of Mass Transportation and Railroad Carriers Act of 2003, which I introduced last year. While I believe that S. 1608 adequately addressed a number of issues, some people expressed concern about the surveillance provisions in that bill. Because of the need to pass rail protection now, I was willing to modify the bill to accommodate some of my colleagues. S. 2289 will provide many of the necessary tools to prosecute terrorist activities, many of which are not currently prosecutable as a terrorist act, by eliminating inconsistencies that exist between the Wrecking Trains statute and the Terrorist Acts Against Mass Transportation statute. Let me take a moment to highlight some of these needless inconsistencies.

The two laws address similar attacks on similar means of transportation, but they often provide inequitable results. For example, the current wrecking trains statute does not prohibit many types of attacks that are currently covered by the mass transportation statute. There is no reason that legislation should prohibit certain terrorist acts on an airplane, but not on a railroad carrier. To that end, the new bill will protect both mass transportation systems, as well as railroads carriers, by consolidating the predicate crimes, including, but not limited to, interfering with a dispatcher or driver and the undermining of our transportation infrastructure.

Moreover, there presently exists a discrepancy in the severity of punishment for terrorists who attack trains versus those who attack other mass transportation systems. Under current law, when someone violates the wrecking trains statute, and that violation results in the death of a citizen, the criminal will be eligible for the death penalty. However, when someone commits a substantially similar criminal act on a plane, in violation of the mass transportation statute, he or she is not eligible for the death penalty. There is no justifiable reason for this distinction, and we should eliminate it so that those who commit similar acts of evil against this country are faced with similar punishments for their crimes.

To that end, this new bill will increase penalties for the most heinous attacks against mass transportation systems by classifying certain offenses—such as those involving mass transportation vehicles carrying passengers—as "aggravated offenses." The penalty for these attacks range from a fine to imprisonment for up to life, or both. These standards will apply against railroad carriers, as well as traditional mass transportation systems. Current law does not apply justice equally in these circumstances, as it should, and S. 2289 remedies these concerns.

In addition, the new bill will:

1. Make it a federal crime to release biological agents or other hazardous materials on the property of mass transportation providers or railroad carriers;
2. Eliminate the inconsistency between the requisite mens rea in the mass transportation statute and the wrecking trains statute, so that a person must simply be shown to have *knowingly* committed the criminal offense. This change will help ease our law enforcement efforts to prosecute those who try to harm our citizens.

Those who wish to attack this country should know that we will no longer distinguish their acts based on what means of mass transportation they choose to attack. We will rule swiftly and severely against anyone who dares to challenge the comfort of the millions of Americans that travel by mass transportation every day.

On more than one occasion the FBI has warned that intelligence has led to the belief that Al Qa'eda and other operatives are targeting the U.S. rail sector. These terrorists plan to do anything from destroying key rail bridges and sections of track to cause derailment or targeting hazardous material containers.

America has demanded more attention to rail security and the administration has responded. No less than two weeks ago DHS announced

plans to, among other things, develop a rapid-response team centered on bomb-sniffing dogs and to implement a pilot program that would test the feasibility of screening luggage. However, we should not stop there. America demands more than additional security mechanisms. We have always responded to criminal threats by passing laws for the purpose of deterring such criminal activities. We must act pro-actively here, to accomplish the same goal.

It is time to put the terrorists on notice that their activities against American citizens will be detected and will result in swift and harsh punishment. We have to give law enforcement the ability to prosecute and give the judicial system the ability to pass harsh sentences.

If terrorists are committed to destroying our freedoms, if they are committed to taking American lives in a premeditated fashion, we have to be committed to fighting their activities on every front. I do not know how we can be any clearer about terrorist activities not being tolerated other than saying that if you are committed to taking American lives, we will be committed to tracking you down and punishing you in the most severe means allowable by law, the death penalty being no exception.

I believe that S. 2289 would accomplish some of those objectives. I look forward to hearing the testimony today and to working on securing America's mass transit system through adequate criminal laws so that the next time someone asks "are the laws adequate," the answer will be "yes."

